CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 27 **JUNE 16, 1993** **NO. 24**

This issue contains:

AVAILABILITY OF BOUND VOLUMES
See inside back cover for ordering instructions

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 93–38)

RECORDATION OF TRADE NAMES: "U.S. ROPE," "U.S. ROPE CO.," "UNITED STATES ROPE COMPANY," AND "UNITED STATES ROPE"

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: On Friday, March 5, 1993, notices of application for the recordations under Section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade names "U.S. ROPE," "U.S. ROPE CO.", "UNITED STATES ROPE COMPANY," and "UNITED STATES ROPE," used by United States Rope Company, a Corporation organized under the laws of the State of California, located at 709 Hamilton Avenue, Menlo Park, California 94025 were published in the Federal Register (58 FR 12629 and 12630). The notices advised that before final action was taken on the applications, consideration would be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordations and received not later than May 4, 1993. No responses were received to the notices.

Accordingly, as provided in Section 133.14, Customs Regulations (19 CFR 133.14), the names "U.S. ROPE," "U.S. ROPE CO.," UNITED STATES ROPE," and "UNITED STATES ROPE COMPANY" are recorded as the trade names used by United States Rope Company, located at 709 Hamilton Avenue, Menlo Park, California 94025. The trade names are used in connection with the sale of rope and other cordage, including rope made of polypropylene, nylon, polyester, Mylar and blended materials, they are of three-stranded twisted and of braided construction.

The merchandise is manufactured in the United States.

EFFECTIVE DATE: June 8, 1993.

FOR FURTHER INFORMATION CONTACT: Delois P. Cooper, Intellectual Property Rights Branch, 1301 Constitution Avenue NW (Franklin Court), Washington, DC 20229 (202–482–6960).

Dated: May 28, 1993.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

[Published in the Federal Register, June 8, 1993 (58 FR 32169)]

(T.D. 93–39)

FOREIGN CURRENCIES

Daily Rates for Countries not on Quarterly List for May 1993

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: Monday, May 31, 1993.

Greece drachma:

May 3, 1993	$0.004640
May 4, 1993	.004666
May 5, 1993	.004660
May 6, 1993	.004655
May 7, 1993	.004640
May 10, 1993	.004581
May 11, 1993	.004579
May 12, 1993	.004577
May 13, 1993	.004555
May 14, 1993	.004589
May 17, 1993	.004570
May 18, 1993	.004537
May 19, 1993	.004545
May 20, 1993	.004574
May 21, 1993	.004537
May 24, 1993	.004513
May 25, 1993	.004534
May 26, 1993	.004523
May 27, 1993	.004580
May 28, 1993	.004648

South Korea won:

May 3, 1993	$0.001251
May 4, 1993	.001250
May 5, 1993	N/A
May 6, 1993	.001250
May 7, 1993	.001249
May 10, 1993	.001248
May 11, 1993	.001246
May 12, 1993	.001245
May 13, 1993	.001246
May 14, 1993	.001245
May 17, 1993	.001242
May 18, 1993	.001242
May 19, 1993	.001243
May 20, 1993	.001242
May 21, 1993	.001241
May 24, 1993	.001242
May 25, 1993	.001243
May 26, 1993	.001243
May 27, 1993	.001243
May 28, 1993	.001243

FOREIGN CURRENCIES–Daily rates for countries not on quarterly list for May 1993 (continued):

Taiwan N.T. dollar:

May 3, 1993	$0.038577
May 4, 1993	.038612
May 5, 1993	.038595
May 6, 1993	.038610
May 7, 1993	.038604
May 10, 1993	.038539
May 11, 1993	.038516
May 12, 1993	.038506
May 13, 1993	.038536
May 14, 1993	.038521
May 17, 1993	.038551
May 18, 1993	.038499
May 19, 1993	.038528
May 20, 1993	.038521
May 21, 1993	.038501
May 24, 1993	.038396
May 25, 1993	N/A
May 26, 1993	.038230
May 27, 1993	.038242
May 28, 1993	.038313

Dated: June 1, 1993.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

(T.D. 93–40)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR MAY 1993

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 93–22 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday: Monday, May 31, 1993.

China, P.R. renminbi yuan:

May 3, 1993	N/A
May 5, 1993	N/A
May 6, 1993	N/A
May 7, 1993	N/A
May 27, 1993	N/A

FOREIGN CURRENCIES—Variances from quarterly rates for May 1993 (continued):

Finland markka:

May 3, 1993	$0.182983
May 4, 1993	.184502
May 5, 1993	.184672
May 6, 1993	.184911
May 7, 1993	.184502
May 19, 1993	.181901
May 20, 1993	.184077
May 21, 1993	.182815
May 25, 1993	.181984
May 27, 1993	.183150
May 28, 1993	.186220

Italy lira:

May 3, 1993	$0.000676
May 4, 1993	.000682
May 5, 1993	.000682
May 6, 1993	.000685
May 7, 1993	.000686
May 10, 1993	.000677
May 11, 1993	.000671
May 12, 1993	.000673
May 13, 1993	.000672
May 14, 1993	.000680
May 17, 1993	.000677
May 18, 1993	.000676
May 19, 1993	.000679
May 20, 1993	.000682
May 21, 1993	.000676
May 24, 1993	.000673
May 25, 1993	.000676
May 26, 1993	.000672
May 27, 1993	.000676
May 28, 1993	.000683

Japan yen:

May 27, 1993	$0.009276
May 28, 1993	.009331

Portugal escudo:

May 13, 1993	$0.006338
May 18, 1993	.006435
May 26, 1993	.006434

Spain peseta:

May 13, 1993	$0.008100
May 14, 1993	.008197
May 17, 1993	.008107
May 18, 1993	.008068
May 19, 1993	.008061
May 20, 1993	.008129
May 21, 1993	.008068
May 24, 1993	.008010
May 25, 1993	.008041

FOREIGN CURRENCIES—Variances from quarterly rates for May 1993 (continued):

Spain peseta (continued):

May 26, 1993	$0.007869
May 27, 1993	.007851
May 28, 1993	.007968

Sri Lanka rupee:

May 5, 1993	N/A
May 6, 1993	N/A
May 7, 1993	N/A
May 17, 1993	N/A
May 18, 1993	N/A
May 25, 1993	N/A

Sweden krona:

May 28, 1993	$0.139392

Thailand baht (tical):

May 3, 1993	N/A
May 5, 1993	N/A

Dated: June 1, 1993.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notice

TESTING OF PRESSED AND TOUGHENED (SPECIALLY TEMPERED) GLASSWARE

AGENCY: Customs Service, Department of the Treasury.

ACTION: Notice of revised procedure and request for further comments on the testing of pressed and toughened (specially tempered) glassware.

SUMMARY: Customs is requesting comments on a proposed method for testing pressed and toughened (specially tempered) glassware, involving the use of polarized light to determine tempering in glass articles. These articles are normally imported under Item numbers 7013.29.05, 7013.32.10, 7013.39.10, and 7013.99.20 of the Harmonized Tariff Schedule of the United States (HTSUS).

DATES: Comments must be received on or before July 6, 1993.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to and inspected at the Office of Laboratories and Scientific Services, Room 7113, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Mr. Robert L. Zimmerman, Jr., Office of Laboratories & Scientific Services, (202) 927–1060.

SUPPLEMENTARY INFORMATION:

BACKGROUND

As a result of comments sought through a Federal Register Notice (Oct. 9, 1991), the U.S. Customs Service published a method for the analysis of "pressed and toughened (specially tempered)" glass articles as a second Federal Register Notice (May 4, 1992). In the second Notice, Customs stated that it would give further consideration to the issue of the use of polarized light in the determination of tempering of these glass articles. This has been completed. This Notice will discuss these issues and includes a proposed revised U.S. Customs Recommended Laboratory Method for these products.

The bases of the tests described herein were addressed in the U.S. Court of International Trade in the "Libbey Glass Case". The Court's opinion can be found in 736 F. Supp. 277 (Slip Op. 90–15, 1990), the U.S. Court of International Trade. The opinion was affirmed on appeal [921 F.2d 1263 (Fed. Cir. 1990)].

The new method includes two major changes. First, for clear and translucent glassware, it has been determined that polarized light can be used to demonstrate that glassware articles have been full surface tempered for Customs purposes. Second, for opaque glassware, the interpretation of the center punch test has been expanded to include certain other breakage patterns in addition to "diced" pieces.

Also, with respect to opaque glassware, the review indicated that information on the cooling parameters, i.e., the cooling curve data, used in the tempering process would complement the recommended method, and be beneficial in the laboratory evaluation of these glass articles. If this data is submitted the laboratory will consider it in the overall evaluation of the commodity.

Prior to publishing a final method, consideration will be given to any written comments, timely submitted, received by Customs as a result of this current Notice. This consideration may include a rigorous assessment of any suggested techniques or methods through an interlaboratory testing program.

Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), Section 1.4, Treasury Department Regulations (31 CFR 1.4) and Section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 A.M. and 4:30 P.M. at the Office of Laboratories & Scientific Services, Room 7113, U.S. Customs Service Headquarters, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

METHOD

SAFETY PRECAUTION: CERTAIN PROCEDURES DESCRIBED IN THIS METHOD POSE A POTENTIAL HAZARD TO PERSONNEL FROM THE PROXIMITY TO OR HANDLING OF BREAKING OR BROKEN GLASS. THIS METHOD SHALL NOT BE UNDERTAKEN WITHOUT SUPERVISORY CONCURRENCE THAT ADEQUATE PRECAUTIONS FOR PERSONAL SAFETY HAVE BEEN IMPLEMENTED.

This method is a series of tests designed to determine that an article has been "pressed" (Macroscopic); determine that it has been "toughened" (Thermal Shock); determine that is has been "tempered" (Polariscopic Examination or Center Punch); determine that an article has been sufficiently tempered to satisfy the qualifier "specially" (Thermal Shock).

I. APPARATUS

A. *Center Punch:*

The center punch is a slender tool having one end tapered to a point. The tool should be approximately 8″ to 12″ in length to permit insertion into tall-form tumblers and other articles of similar shape while the non-pointed end extends above the rim. This is necessary for ease of handling and for safety while performing the center punch test. The pointed end of the center punch should not be sufficiently sharp to chip the glassware on contact without the application of pressure.

B. *Photographic Equipment:*

A camera (equipped with or supplemented by adequate lighting) capable of photographing broken glass patterns or fragments in sufficient detail to reveal physical characteristics such as the size of the pieces, their shape, and number is recommended for making a permanent record of borderline or unusual samples.

C. *Polariscope:*

The basic instrument consists of a light source, a polarizer, and an analyzer. The addition of a full-wave retardation, or tint, plate permits observation of color-enhanced stress patterns. Ideally, the working space, or distance between the polarizer and the analyzer, should be large enough to accommodate samples ranging up to eight inches in height.

D. *Other Apparatus and Supplies:*

The method requires various common laboratory articles such as an ordinary hammer, a caliper or similar device for measuring the diameter of the opening and the maximum inside diameter of the sample, an oven and water bath, and other equipment and supplies. Appropriate safety devices and appropriate protective clothing are also required.

II. Preparation of the Sample

When available a representative number of samples should be analyzed. However, it is recognized that for any of several reasons, e.g., cost of the item, only a limited number of samples may be submitted for analysis. The possibility exists that only one sample may be available for testing.

The analyses should be conducted in the order listed below. The test protocol should be terminated at the point that a sample fails to meet any of the key criteria, i.e., "pressed", "toughened", "tempered", or "specially".

III. Analysis Procedures

A. *Macroscopic Analysis – Examine each article of glassware as follows:*

1. Visual Inspection:

Inspect the sample for:

- identifying marks, labels, sizes, etc., especially those that may have been caused by a push-up valve and a mold that have been pressed into the article;
- the style (stemware, tumbler, bowl, plate, etc.);
- the presence of ribs, handles, flutes, etc.;
- the size of the rim or opening, if applicable;
- the size of the most bulbous portion of the article;
- any other unusual characteristics (e.g., chips, cracks)

Interpretation of Visual Inspection results: Characteristics such as mold marks, ribs, handles, flutes, are often indicative of a pressed rather than blown glass article.

2. Dimensional Measurement (applies only to stemware, tumblers, bowls, etc.):

- Using a caliper or similar device, measure the minimum diameter of the mouth, opening, or upper rim of the sample. With the same device, measure the maximum inside diameter. Record both measurements.

Interpretation of Dimensional Measurement results: A sample having a maximum inside diameter greater than the minimum diameter of the mouth, opening, or upper rim is not likely to have been "pressed".

Interpretation of the Macroscopic Analysis Test: The analyst is advised to consider the overall features of the article and the dimensional analysis test results in determining that an article has been "pressed". If the results show that the sample is not "pressed" the testing sequence for this sample should be terminated at this point.

B. *Thermal Shock Test:*

- Heat the sample(s) in an oven to 160°C for 30 minutes.
- Remove 1 sample from the oven and *immediately* immerse it in a water bath set at 25°C. This effects a 135°C difference in temperature. [Note: Reasonable alternate oven and water bath settings up to ±10°C are acceptable as long as the 135°C difference in temperature is maintained.]

Interpretation of Thermal Shock Test results: Annealed glassware and inadequately or partially tempered glassware will generally not survive this test of durability or toughness. If breakage occurs, the sample is not "toughened" for Customs purposes. Record the findings, and terminate the analysis. If breakage does not occur, proceed to the Center Punch Test for opaque glassware or to the Polariscopic Examination if the article is transparent or translucent.

C. *Polariscopic Examination:*

This method for the qualitative evaluation of temper in glassware should be conducted only on those transparent or translucent articles which survive the Thermal Shock Test. This method is not applicable to opaque items or to articles which have been tempered by a process other than thermal tempering.

- Place the full-wave retardation plate (tint plate) between the polarizer and the analyzer. The polarized light must pass through both the sample and the retardation plate for the color-enhanced polariscopic pattern to be observed through the analyzer. Position the retardation plate in direct contact with the polarizer or, alternatively, just in front of the analyzer.
- Turn on the light source.
- Evaluate the stress in the bottom of the intact article by placing its bottom surface in contact with the polarizer so that the polarized light passes perpendicularly through the bottom surface, or as close

to perpendicularly as possible, depending upon the article's shape. [This positioning does not work well with stemware because of color patterns caused by the stem itself. With these items, it will be necessary to hold the glass at a slight angle to view the base and the bowl separately.]

- Evaluate the stress in the sides of the intact article, especially near the rim or edge, by positioning the article so that the polarized light passes perpendicularly through the sides near the rim, or as close to perpendicularly as possible, depending upon the article's shape. Observation of the stress patterns in the sidewall and rim areas should be made while viewing through a single thickness of glass. For some items, especially stemware, tumblers, and mugs, this will require holding the article at a slight angle to the polarizer (open end raised slightly).

Interpretation of the Polariscopic Examination: Thermal tempering of glassware involves heating to the softening point followed by rapid cooling. The surfaces cool first and reach a temperature where they become rigid. With further cooling, the interior or core tries to shrink but is prevented from doing so by the rigid surface layers. This results in the surfaces being locked into a state of high compression and the interior locked into compensating tension.

When polarized light rays travel through a stressed material, they divide into slow and fast fronts. As a result of the difference in speed of the slow and fast rays, interferences occur and a pattern of colors is observed. These colors can be used to evaluate the stresses in the article. As the stress increases, the observed color changes to reflect the amount of stress. The color changes follow a rigorous sequence as the stress-induced retardation – distance between the fast and slow rays – increases. In low-stress areas, black and shades of gray are seen. Evaluation of low stress is simplified by using a color-enhancing retardation or tint plate which adds a shift of one fringe order, or 565 nm, in the color pattern throughout the observed field. With the tint plate in place, even low and moderately stressed articles will exhibit a contrasting color effect.

Annealed glassware will exhibit a uniform coloration of the polarized light passing through it; there will be essentially no change from background. Tempered articles will exhibit nonuniform coloration of the polarized light on the bottom surface and sidewalls and bands of color parallel to the rim or lip.

If the sample passes the Thermal Shock Test and shows evidence of full-surface tempering (as opposed to rim-tempering or partial tempering) when examined polariscopically, the sample has been "toughened (specially tempered)" for Customs purposes.

D. *Center Punch Test for Opaque Glassware:*

- Set the sample to be tested on a solid, level surface.
- Hold the center punch vertically, and place the pointed end against the inside center bottom or heel.

- Strike the dull end of the punch with a hammer, using blows of gradually increasing severity, until breakage occurs.
- Note the breakage pattern, number, and relative shape and size of the fragments (indicate this without making an actual count). Without disturbing the broken pieces, photograph the breakage pattern and/or typical fragments in the case of a borderline or unusual sample.
- Allow the broken pieces to remain undisturbed for 24 hours. Note whether evidence is present of continued breakage, e.g., more pieces, smaller pieces, increased crazing in unbroken pieces.

Interpretation of the Center Punch Test results: The Court decisions in the Libbey Glass case (cited above) hold that the term "toughened (specially tempered)" applies to full-surface tempered glassware which has greater resistance to mechanical and thermal shock than ordinary annealed or partially tempered glassware; that "specially" is not to be equated with "highly"; and that to qualify for classification under this term, glassware does not have to be tempered so fully that it dices completely upon breakage. The Court also recognized that uniformity of tempering from point to point in an article is affected by the article's configuration or shape and by variations in thickness.

"Toughened (specially tempered)" glassware will require more force to break by the center punch test than ordinary annealed glassware. While the presence of dicing (small cubes of roughly equal dimension on all six sides) and/or crazing (diced pieces remaining tenuously in contact with neighboring pieces) is a strong indication that an article has been tempered, it must be recognized that few, if any, tempered articles will dice completely when broken and that some tempered articles will not exhibit any dicing or crazing at all. The degree and uniformity of tempering and the article's shape and thickness greatly affect the breakage pattern.

With flatter articles such as plates and saucers, a radial breakage into wedge-shaped pieces is frequently observed. Often a network of cracks develop in these pieces as the process of stress relief continues. After remaining undisturbed for 24 hours, it is not uncommon to find that more but narrower wedges, long rectangular strips, and even some diced pieces have been generated by this continuation of breakage. This radial breakage pattern, with or without evidence of continuation of breakage upon standing, is an indication that the article has been tempered.

With drinking glasses, the stem and base of stemware styles seldom disintegrate. The most common breakage pattern for stemware is for the bowl to break, leaving a tack-shaped fragment consisting of the intact base and a portion of the stem.

When faced with an inconclusive breakage pattern, laboratory analysts may give consideration to the cooling curve data, if provided by the importer, in determining that the article has been properly tempered.

IV. Conclusion

An important feature of "toughened (specially tempered)" glassware is its resistance to breakage, its durability. A sample that has survived the thermal shock test has been proven to be "toughened" for Customs purposes. The Center Punch Test then assists in establishing that this toughness or durability is the result of a full-surface tempering process. If the sample passes the Thermal Shock Test and shows evidence of full-surface tempering per the guidance given above for the Polariscopic Examination or the Center Punch Test, then the sample has been sufficiently tempered to satisfy the qualifier "specially."

Dated: May 28, 1993.

John B. O'Loughlin,
Director,
Office of Laboratories and Scientific Services.

[Published in the Federal Register, June 4, 1993 (58 FR 31786)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 151 and 152

ELECTRONIC TRANSMISSION OF CUSTOMS FORMS 28 AND 29

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Withdrawal of proposed rule.

SUMMARY: This document withdraws a proposal to amend the Customs Regulations to provide that entry filers who have access to the Automated Broker Interface (ABI) may elect to receive Customs Form 28, Request for Information, and Customs Form 29, Notice of Action, electronically through ABI. Most of the commenters were in favor of the proposal only if participation is voluntary at the importer's option. Customs has concluded that making importer participation voluntary would result in the proposal not being cost beneficial to the government. Accordingly, Customs has determined to withdraw the proposal.

DATE: Withdrawal effective on June 6, 1993.

FOR FURTHER INFORMATION CONTACT: Richard Bonner, Office of Automated Commercial Systems, (202) 927–1081.

SUPPLEMENTARY INFORMATION:

Background

On September 24, 1992, Customs published a notice in the Federal Register (57 FR 44143), proposing to amend §§ 151.11 and 152.2, Customs Regulations (19 CFR 151.11, 152.2), to provide that entry filers who have access to the Automated Broker Interface (ABI) may elect to receive Customs Form 28, Request for Information, and Customs Form 29, Notice of Action, electronically through ABI.

The notice proposed that in lieu of preparing Customs Forms 28 and 29 manually, the Customs officer would prepare the forms on an Automated Commercial System (ACS) computer system terminal. If the referenced entry were filed electronically via ABI, and the entry filer elected to receive Customs Forms 28 and 29 electronically, the form information would be transmitted to the entry filer electronically via ABI and no documents would be mailed by Customs. The proposal provided

that if the ABI entry filer were a customs broker, it would be the responsibility of the broker to provide this form information to the importer. The proposal further provided that if the entry filer did not elect to receive Customs Forms 28 and 29 electronically, the ACS system would automatically generate the printed forms and Customs would mail the forms to importer and/or customs broker according to current procedures.

Most of the comments favored the concept of the proposal. However, there was much concern indicated about creating a system whereby all notices are sent to the brokers. It was suggested by several commenters that importers should be able to choose whether they want their brokers to receive the notices electronically.

Taking this into consideration, Customs has determined that it should not proceed with the proposal at this time. Customs believes that administering a system that would allow a customs broker to receive Customs Forms 28 and 29 electronically through ABI for some of its importer clients, but not for other importer clients who choose to receive the form directly from Customs, appears not to be cost beneficial for the government at this time, particularly when one takes into account the cost of the system's development. Further, Customs believes that if the proposal is so modified, it will not result in a meaningful reduction in paper.

Accordingly, Customs has concluded that the proposal be withdrawn at this time. It is likely, however, that Customs will reexamine such a proposal when the Customs Modernization Act is passed.

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: May 21, 1993.
RONALD K. NOBLE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, June 3, 1993 (58 FR 31487)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 93–79)

FLORAL TRADE COUNCIL, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND VISAFLOR, S.A., RANCHO DAISY, RANCHO GUACATAY, AND RANCHO MISION EL DESCANSO, DEFENDANT-INTERVENORS

Court No. 92–06–00393

[Partial judgment for plaintiff.]

(Dated May 25, 1993)

Stewart & Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr. and *Amy S. Dwyer)* for plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(Marc E. Montalbine);* Office of Chief Counsel for Import Administration, United States Department of Commerce *(Patrick V. Gallagher, Jr.),* of counsel, for the defendant.

Porter, Wright, Morris & Arthur (Leslie Alan Glick) for defendant-intervenor, Visaflor, S.A.

Katten Muchin Zavis & Dombroff (James M. Lyons) for defendant-intervenors, Rancho Daisy, Rancho Guacatay, and Rancho Mision El Descanso.

OPINION

RESTANI, *Judge:* This matter is before the court on plaintiff's Rule 56.1 motion for judgment upon the agency record. This is a challenge to the final results of the fourth administrative review of an antidumping order. *Certain Fresh Cut Flowers from Mexico,* 57 Fed. Reg. 19,597 (Dep't Comm. 1992) (final results of antidumping duty admin. review) (hereinafter *"Final Results").* Plaintiff, Floral Trade Council ("FTC"), protests the decision of the International Trade Administration ("ITA") to calculate a single unified antidumping duty rate, which would be applied to all shippers, both old and new, who did not receive their own individual rates in either the original less than fair value ("LTFV") investigation or a subsequent administrative review.

For the five producers named in the administrative review, ITA was satisfied with the data submitted by the producers, finding no need to base calculations on best information available ("BIA"). *See* 19 U.S.C. § 1677e(c) (1988). For the two producers whose home market sales were below their cost of production ("COP"), ITA based foreign market value ("FMV") on constructed value ("CV"). FTC challenges ITA's verifica-

tion procedure and its methodology in calculating CV to determine the rate for one of the producers, Rancho Mision el Descanso ("Rancho Mision"). As the only positive rate, and therefore, the highest rate calculated, Rancho Mision's rate, according to current ITA practice, would apply to all future entries made by producers who did not receive their own rate.

BACKGROUND

In accordance with 19 CFR § 353.22(a)(1) (1992), FTC requested an administrative review for three producers/exporters of fresh cut flowers from Mexico: Rancho del Pacifico, Rancho Daisy, and Rancho Mision. The review covered production of standard carnations, standard chrysanthemums, and pompon chrysanthemums for the period April 1, 1990 through March 31, 1991. Two other producers, Rancho Guacatay and Visaflor, asked to be included in the review. All five producers submitted questionnaire responses to ITA.

On November 1, 1991, FTC requested a COP investigation for Rancho Daisy, Visaflor and Rancho Mision. ITA rejected FTC's untimely COP allegations against Visaflor. Rancho Daisy and Rancho Mision responded to the COP questionnaires sent by ITA.

In its COP questionnaire response, Rancho Mision allocated various costs. ITA's verification report indicated that the agency was able to reconcile Rancho Mision's COP responses for various costs with the appropriate accounting records or source documents. It was unable, however, to verify by means of the general ledger the cultivation-area allocation methodology used in the COP response. Visual identification of cultivation area was also hampered by the fact that, at the time of verification, Rancho Mision had converted many of its greenhouses from the production of carnations to the production of other flowers. ITA stated, however, that by using methods other than strict visual inspection, it was able to verify cultivation area as reported by Rancho Mision. It accepted Rancho Mision's cost allocation as an appropriate method for estimating the cost of cultivating the carnations.

As Rancho Mision was the only producer receiving a positive rate in this review, ITA designated its rate as the cash deposit for future entries of all other shippers who did not receive an individual duty rate. The 18.20% "all other" rate calculated in the LTFV investigation was discarded.

FTC challenged ITA's adoption of a unified rate in a previous action before this court. *Floral Trade Council v. United States*, 16 CIT ___, 799 F. Supp. 116 (1992) *("Floral Trade I")*. In that case, this court noted that the industry was extremely fragmented, with new producers entering the market frequently, and it is difficult for Customs to determine which producers are new shippers. *Id.* at ___, 799 F. Supp. at 118. Therefore, this court determined that "[a]ssuming that no statutory or regulatory barriers to use of a single rate exist," ITA's decision to utilize a single rate to avoid administrative difficulties appears to be practical and justified. *Id.* Although FTC did not allege a conflict with ITA's regu-

lation, the court expressed skepticism regarding ITA's interpretation of the plain language of 19 C.F.R. § 353.22(e)(2) and a concern that not all relevant arguments had been made on the issue. *Floral Trade I,* 16 CIT at ____ n.2, 799 F. Supp. at 119 n.2. Thus, the court declined to hold that ITA's new approach was consistent with its regulation. *Id.* at ____ & n.2, 799 F. Supp at 119 & n.2. Rather, the court held that ITA was not precluded for purposes of that case from using one "all other" rate for "old" and "new" shippers. *Id.* at ____, 799 F. Supp. at 120. In this case, unlike the previous one, FTC challenges the regulation outright and both domestic and exporting interests are participating. Thus, the issue is now squarely presented. The court will first address this issue, then turn to the challenge to verification procedures.

Discussion

I. Use of Unified "All Other" Rate

FTC challenges ITA's new procedure for setting an "all other" rate on several bases: 1) administrative ease is an insufficient reason to change a long-standing practice relied upon by domestic producers; 2) ITA failed to provide notice of the proposed change and an opportunity for interested parties to comment; 3) shippers, anticipating lower "all other" rates, will be less likely to participate in subsequent administrative reviews to obtain an individual rate, thereby placing an undue burden on domestic producers to identify shippers who should be reviewed; and 4) Congress specifically instructed ITA to establish regulations to provide for the automatic assessment of duties when a review is not requested.

A. *Long-standing Practice of Dual Rates:*

It was ITA's long-standing practice to calculate an "all other" rate in the original LTFV determination. *Certain Fresh Cut Flowers from Mexico,* 55 Fed. Reg. 12,696, 12,699 (Dep't Comm. 1990) (final results of antidumping duty admin. review). The rate would apply to all producers currently active in that market who did not receive an individual rate in the investigation. ITA continued to apply that rate to future shipments of "old shippers" unless those firms received an individual rate in a subsequent administrative review. *Floral Trade I,* 16 CIT at, 799 F. Supp. at 118. Firms that began exporting to the United States after the last day of the review period, so-called "new shippers," were assigned the highest verified rate of any reviewed firm in the administrative review. *Id.* at ____, 799 F. Supp. at 118; *see Certain Fresh Cut Flowers,* 55 Fed. Reg. at 12,700.

ITA consistently followed this practice until it issued its determination in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France,* 56 Fed. Reg. 11,178 (Dep't Comm. 1991) (prelim. results of antidumping duty admin. reviews). In that review, ITA did not assign the highest non-BIA rate in the review to new exporters only. Rather, that rate was now designated as the "cash deposit rate for *all other* manufacturers/exporters." *Id.* at 11,181 (emphasis added).

Prior to this determination, the agency neither announced its intention to change the procedure nor solicited comments on the effects of the change. When later challenged, ITA's major justification for the change was that the Customs Service was experiencing administrative difficulties in distinguishing shippers that qualified under the "all other" rate from those covered by the "new shipper" rate. *Floral Trade I,* 16 CIT at ____, 799 F. Supp. at 118; *Certain Circular Welded Carbon Steel Pipes and Tubes From Thailand,* 57 Fed. Reg. 38,668, 38,671–72 (Dep't Comm. 1992) (stating that for administrative reasons, ITA did not have the option of reverting to the previous practice). FTC argues that agency convenience, without more, is not a sufficient basis to change a long-standing procedure. The domestic industry, FTC contends, relies upon the existence of an 18.20% "all other" rate in deciding whether to request a review and which companies to include in its request.

ITA itself admits that the dual rate practice was in effect for a substantial period of time. In fact, it was only in April 1990, during the first administrative review in *Certain Fresh Cut Flowers,* that ITA denied the request of five respondents for revision of the "all other" rate on the basis of new margins established in the current administrative review. 55 Fed. Reg. at 12,699. It was ITA's position then that application of the LTFV "all other" rate to companies that did not request a review was a "long-standing practice * * * upheld by the Court of International Trade." *Id.* Yet, only one year later, ITA changed its practice to the one suggested by those five respondents, claiming administrative necessity.[1] At that time ITA did not explain why applying the new shipper rate was more appropriate than use of the "all other" rate from the original LTFV investigation or some other rate, such as a new averaged rate.[2] *See Floral Trade I,* 16 CIT at ____, 799 F. Supp. at 119. ITA has still not explained why the "new shipper" rate is the appropriate rate, even for new shippers.

B. *Notice of Change and Opportunity for Comment:*

ITA changed its practice without notice or opportunity for comment by interested parties. ITA argues that the practice is an interpretative rule not subject to the notice and comment requirements of the Administrative Procedure Act ("APA"). *See Timken Co. v. United States,* 11 CIT 786, 805–06, 673 F. Supp. 495, 514 (1987); 5 U.S.C. § 553(b)(A) (1988). Interpretative rules either clarify or explain existing law, rather than treating new law, rights, or duties. They indicate what the admin-

[1] In reviewing the relevant administrative determinations, the court notes, as did FTC, that ITA has been somewhat inconsistent, at least initially, in its practice of assigning a single rate for "all other" shippers. In some cases, ITA continued to apply two rates. *See, e.g., Color Television Receivers, Except for Video Monitors, from Taiwan,* 56 Fed. Reg. 31,378, 31,387 (Dep't Comm. 1991) (final results of antidumping duty admin. review). In others, a unified rate was assigned, but it was not the highest verified rate for any reviewed firm in the current review, and there was no explanation of how the rate was derived. *See, e.g., Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Certain Components Thereof, from Japan,* 56 Fed. Reg. 65,228, 65,240 (Dep't Comm. 1991) (final results of antidumping duty admin. review); *3.5" Microdisks and Coated Media Thereof from Japan,* 56 Fed. Reg. 36,768, 36,773 (Dep't Comm. 1991); *Television Receivers, Monochrome and Color, from Japan,* 56 Fed. Reg. 16,069, 16,072 (Dep't Comm. 1991) (final results of antidumping admin. review). It would seem that inconsistent application of any practice would create more of an administrative burden than a consistent application of a dual rate structure.

[2] In this case, because only one rate was calculated, there is nothing to average. ITA's new methodology does not seem to permit averaging in a case with several calculated rates, however.

istrative officer thinks the statute or regulation means. *Timken*, 11 CIT at 805–06, 673 F. Supp. at 514 (citations omitted). Here, ITA does not explain what aspect of the statute or regulation the rule interprets.[3] Of course, if the "rule" is in conflict with an applicable regulation, it may not stand.

C. *Prejudice to Domestic and Foreign Producers:*

ITA claims the domestic industry is not prejudiced by its methodology because if a domestic producer believes that a particular "all other" deposit rate does not accurately depict current pricing practices for firms not covered by an individual rate, it may request an administrative review of particular firms. The burden may be inappropriately distributed in this situation. On the one hand, it seems reasonable to place the burden for requesting a review on those parties who have better access to the information necessary to challenge a duty assessment, i.e., the foreign producers. Furthermore, domestic producers do not always have the resources to pursue action against every foreign producer engaged in dumping activities and in this case it is difficult to tell which specific producers are the source of concern. Also, the legislative history suggests that the U.S. government should share more of the burden if an industry has already demonstrated that it has been injured by foreign dumping. H.R. Rep. No. 725, 98th Cong., 2d Sess. 24 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5127, 5151.

On the other hand, in this fragmented industry of numerous small producers, many foreign producers are not in a position to challenge an unfair deposit rate. ITA has not provided an explanation as to why, in this situation, the *highest* rate calculated in the review should apply to all uninvestigated producers. ITA's new methodology may drive small producers out of the market by assessing an unreasonably high deposit rate, which the producers are not in a position to oppose. Although the main concern of foreign producers and importers may be the stability of rates, the court assumes that such producers and importers are also concerned with avoiding vastly inappropriate deposit rates based on some other party's "highest rate."[4] Presumably any methodology should strive for a balance in the burdens it imposes upon parties with competing interests. It is not clear to the court that ITA has made a reasonable attempt to achieve this balance.

D. *Congressional Acquiescence:*

ITA claims that, although Congress has amended 19 U.S.C. § 1673e, concerning assessment of duty, twice since 1981, there has been no attempt to change ITA's practice of not applying the LTFV "all other" rate to all companies without an individual rate. ITA interprets this to mean that Congress has acquiesced in ITA's interpretation that the an-

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[3] In *Timken*, for example, this court found that the agency's practice of disregarding below-cost sales that represent less than ten percent of total home market sales in effect constitutes an interpretation of the term "substantial quantities" in 19 U.S.C. § 1677b(b)(1). *Timken*, 11 CIT at 806, 673 F. Supp. at 514.

[4] While this is not the case here, it is a concern as to general application of this new rule.

tidumping statute does not require application of the LTFV rate to all firms without an individual duty rate. *See Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 381 (1969) (stating that an agency construction of a statute should be given great weight, especially when "Congress has refused to alter the administrative construction"). While a weak argument might be made that Congress agrees that new shippers need not receive the LTFV rate, congressional silence might also be interpreted to mean acquiescence in ITA's long-standing practice of applying the LTFV rate to old uninvestigated shippers. The court does not rely on either acquiescence view.

E. *The Regulation:*

The court agrees with ITA that the statute, the legislative history, and the regulations do not prescribe the methodology for calculating the "all other" rate in original LTFV determinations. *See National Knitwear & Sportswear Ass'n v. United States*, 15 CIT ____, ____, 779 F. Supp. 1364, 1368–69 (1991) (discussing 19 U.S.C. § 1673d(a)(1) (1988) and 19 U.S.C. § 1673e(a)(1) (1988)). The statute is also not entirely clear as to the degree to which the original LTFV determination should continue to apply after an annual review to companies which have not participated in the review. *See* 19 U.S.C. § 1675(a) (1988). The legislative history states, however, that ITA "should provide by regulation for the assessment of antidumping and countervailing duties on entries for which review is not requested, including * * * the conversion of cash deposits of estimated duties, previously ordered." H.R. Rep. No. 1156, 98th Cong., 2d Sess. 181 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5220, 5298.

The regulation 19 C.F.R. § 353.22(e) details the process for assessing duties for parties not involved in an administrative review. The regulation reads as follows:

> (e) *Automatic assessment of duty.*
>
> (1) For orders, if the Secretary does not receive a timely request [for administrative review] * * *. the Secretary, without additional notice, will instruct the Customs Service to assess antidumping duties on the merchandise * * * at rates equal to the cash deposit of, or bond for, estimated antidumping duties required on that merchandise at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposits previously ordered.
>
> (2) If the Secretary receives a timely request [for administrative review] * * *, the Secretary in accordance with paragraph (e)(1) of this section will instruct the Customs Service to assess antidumping duties, and to continue to collect the cash deposits, on the merchandise not covered by the request.

19 C.F.R. § 353.22(e) (1992). In promulgating the final version of the regulation, ITA explained, "[i]f no review of particular entries is requested * * *, the cash deposit rate becomes the "fixed" rate, and the entries will be liquidated at that rate." *Antidumping Duties*, 54 Fed. Reg. 12,742, 12,757 (Dep't Comm. 1989) (final rule). ITA reasoned,

"[b]ecause the cash deposit (or bond) rate is the basis for each interested party's decision whether to exercise its right to request a review, it would make no sense to change the rate after the time for request has expired." *Id.* at 12,756.

ITA did not adhere to this interpretation in *Floral Trade I*. It argued instead that the language in § 353.22(e)(2), which directs the Customs Service to "continue to collect the cash deposits" for unreviewed companies, does not refer to "the cash deposits previously ordered," mentioned in § 353.22(e)(1). *See Floral Trade I*, 16 CIT at ____, 799 F. Supp. at 119. Refusing to equate "cash deposits" with "cash deposits previously ordered" would allow the Customs Service to collect duty deposits based on a cash deposit rate determined after an annual review rather than at an original LTFV determination. As indicated, the court in *Floral Trade I* was not entirely convinced by ITA's argument. *Id.*

ITA has now abandoned the strained reading it adopted in *Floral Trade I*, and contends that the regulation simply does not apply to the "all other" rate. This is a new position and it is inconsistent with the position previously taken before this court and with the position ITA espoused at the time it promulgated the regulation. As 19 C.F.R. § 353.22(e) does not by its terms exclude "all other" rates from its coverage, the court now concludes that § 353.22(e) prevents abandonment of LTFV "all other" rates for "old shippers," which have never been investigated or reviewed. As indicated in the previous sections, the statute, past practice, and concerns of fairness do not compel the position taken by defendant in this action.[5] Accordingly, ITA's regulation is valid, and it applies in this situation to "old" shippers without individual rates.

II. Verification Procedures in Determining Constructed Value

The second issue in this action involves ITA's verification at Rancho Mision. The purpose of the antidumping statute is "determining current margins as accurately as possible." *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (1990). According to 19 C.F.R. § 353.36(a)(iv) (1992), ITA is required to verify all factual information relied on in the final results of an administrative review. Verification may include a review of all producer files and records, and questioning of personnel, insofar as they are considered relevant to the investigation. *See* 19 C.F.R. § 353.36(c). Verification is an audit process that selectively tests the accuracy and completeness of a respondent's submissions. *Bomont Indus. v. United States*, 14 CIT 208, 209, 733 F. Supp 1507, 1508 (1990). If the agency is unable to verify, within a specified time period, the accuracy and completeness of the information submitted, the agency will use BIA. 19 C.F.R. § 353.37(a)(2) (1992).

FTC argues that ITA is charged with calculating reasonable, accurate dumping margins based on verifiable allocation of costs where insufficient actual price or cost data is available. According to FTC, ITA's in-

[5] The court does not reach the issue of statutory constraints. Also, the parties advised the court that similar issues are being considered in *Federal-Mogul Corp. v. United States*, No. 92–06–00422.

ability to verify directly all of Rancho Mision's reported costs or the data underlying its cultivation-area allocation methodology required ITA to resort to BIA. FTC contends that record data does not support ITA's claim that it was able to verify Rancho Mision's response by alternative means. FTC claims, *inter alia,* that cultivation area devoted to carnations can only be substantiated by confirming that areas within the greenhouses devoted to other flower types remained constant.

Congress has afforded ITA a degree of latitude in implementing its verification procedures. *PPG Indus., Inc. v. United States,* 15 CIT ____, ____, 781 F. Supp. 781, 787 (1991) (citing *Kerr-McGee Chem. Corp. v. United States,* 14 CIT 344, 362, 739 F. Supp. 613, 628 (1990)). The decision to select a particular method of verification rests solely within the agency's sound discretion. *Hercules, Inc. v. United States,* 11 CIT 710, 726, 673 F. Supp. 454, 469 (1987). If a reasonable standard is applied and the verification is supported by substantial evidence, the court will sustain the methodology. *Id.*

Although ITA was not able to verify each item submitted in Rancho Mision's questionnaire, the approach the agency took in its verification procedure was reasonable and adequate under these circumstances. There is no evidence that any of the information sought during the verification process was inadequate or suspect. In the time period allotted for verification, ITA was able to conduct a physical inspection of the production areas, and to review source documents to verify questionnaire responses for numerous elements necessary to calculate constructed value.

There is a good deal of confusion about whether Rancho Mision used a correct cost allocation method, because it appears to use other allocation methods for other purposes. Allocation is necessarily an inexact science, and is simply a way to *estimate* the costs incurred by the firm to manufacture the product, complete the process, or deliver the service. Allocation methods vary even among firms in the same industry. The simplest and most reasonable cost allocation method in this instance appears to be cultivation area, as utilized by Rancho Mision in its questionnaire response.[6] In calculating constructed value, ITA is obligated to allocate various costs, expenses, and profit to the products subject to investigation. *See* 19 U.S.C. § 1677b(e)(1) (1988); *Ipsco, Inc. v. United States,* 384, 387, 687 F. Supp. 633, 635 (1988). ITA apparently believed cultivation-area cost allocation was reasonable, leading to a relatively accurate calculation of dumping margins.

The court does not agree with FTC's contention that Rancho Mision's changeover in production, prior to the verification, precluded ITA from accepting Rancho Mision's response regarding cultivation area dedicated to standard carnations. Surely, FTC recognizes that over the course of time, there can, and will be, changes in production and/or layout. This should not necessarily result in rejection of a respondent's cost

[6] If restricting allocation to greenhouse area rather than total area is detrimental to anyone, it is to defendant-intervenor because carnations represented a larger portion of the greenhouse area than of the total cultivation area.

data, particularly if ITA is confident that it can reconstruct the necessary information from other materials available and determine within reasonable limits the accuracy of the response. From the record, it appears that, despite the recent changeover in greenhouse production, ITA was sufficiently satisfied with the physical inspection and data regarding number of plants purchased and sold, shipments, dimensions of greenhouses, and number of beds, to conclude that Rancho Mision's questionnaire response regarding cultivation area for standard carnations was fairly accurate. There appears to be no reason to disregard ITA's determination on this point. Nor does the court find reason to challenge ITA's acceptance of Rancho Mision's explanation for changes in its methodology. If ITA finds information submitted by a respondent "to be complete and its explanations sound, it may need no further information." *PPG Indus.*, 15 CIT at ____, 781 F. Supp. at 787 (quoting *Kerr-McGee*, 14 CIT at 362, 739 F. Supp. at 628).

The court finds ITA's determination as to constructed value to be based on substantial evidence on the record, and otherwise in accordance with law.

CONCLUSION

ITA must apply 19 C.F.R. § 353.22 to construct the rate for "old" unreviewed shippers. In all other respects the determination is sustained. ITA is to report its final results in thirty days. If no objections are filed within ten days thereof, the determination shall be sustained.

(Slip Op. 93–80)

PUBLIC VERSION

NIHON CEMENT CO., LTD., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND THE AD HOC COMMITTEE OF SOUTHERN CALIFORNIA PRODUCERS OF GRAY PORTLAND CEMENT, ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 91–06–00425

[Plaintiffs' motions for judgment on the agency record and remand granted in part and denied in part; Remanded in part to the Department of Commerce.]

(Dated May 25, 1993)

Akin, Gump, Hauer & Feld, (Patrick F.J. Macrory, Spencer S. Griffith and *Robert W. Aulsebrook)* for plaintiff Onoda Cement Co., Ltd. and defendant-intervenor Onoda Cement Co., Ltd.

Kilpatrick & Cody, (Joseph W. Dorn, Martin M. McNerney, Gregory C. Dorris and *Damon V. Pike)* for plaintiff The Ad Hoc Committee of Southern California Producers of Gray Portland Cement and defendant-intervenor The Ad Hoc Committee of Southern California Producers of Gray Portland Cement.

Graham & James, (Yoshihiro Saito and *Brian E. McGill)* for plaintiff Nihon Cement Co., Ltd.

Stuart M. Gerson, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, (Jeffrey M. Telep); Stephen J. Claeys, Attorney-Advisor, Office of the Chief Counsel for Import, Department of Commerce, of counsel, for defendant.

MEMORANDUM OPINION

GOLDBERG, *Judge:* Plaintiffs Nihon Cement Co., Ltd. ("Nihon"), Onoda Cement Co., Ltd. ("Onoda") and The Ad Hoc Committee of Southern California Producers of Gray Portland Cement ("Ad Hoc") bring this consolidated action challenging the final determination of the United States Department of Commerce, International Trade Administration ("Commerce"), in *Gray Portland Cement and Clinker from Japan,* 56 Fed. Reg. 12156 (Dep't Comm. 1991) (final determination), as amended by *Gray Portland Cement and Clinker From Japan,* 56 Fed. Reg. 21658 (Dep't Comm. 1991) (antidumping duty order). Plaintiffs argue that Commerce's determination is not supported by substantial evidence contained in the administrative record and is not in accordance with the law.

Defendant argues that the motions for judgment upon the administrative record and remand should be denied and Commerce's determination should be sustained, except for one aspect of Commerce's calculation of Onoda's United States price. Commerce concedes that it incorrectly deducted all of Lone Star Northwest's corporate general and administrative expenses ("G&A") as selling expenses. Commerce requests that the calculation of Onoda's United States price be remanded to the agency for recalculation.

Commerce claims that its determination is otherwise supported by substantial evidence contained in the administrative record and is in accordance with the law.

Plaintiffs Ad Hoc and Onoda also participated as defendant-intervenors.

The court has jurisdiction under 28 U.S.C. § 1581(e) (1988).

The court sustains Commerce's determination in part. The court finds that Commerce's determination, in part, was not based upon substantial evidence and was not in accordance with the law, and remands to Commerce as to those relevant parts.

BACKGROUND

Plaintiff Ad Hoc filed an antidumping duty petition with Commerce and the United States International Trade Commission ("Commission") on May 18, 1990. The petition alleged that imports of gray portland cement and cement clinker ("cement and clinker") from Japan were being sold in the United States at less than fair value, and that an industry in the United States was materially injured or threatened with material injury by reason of the imports.

On June 15, 1990, Commerce published a notice of initiation of a less-than-fair value investigation covering imports of gray portland cement from Japan regarding the period December 1, 1989 through May 31, 1990. *Gray Portland Cement (Including Cement Clinker) from Japan,* 55 Fed. Reg. 24,295 (1990) (initiation of investigation).

Although Commerce's notice of initiation requested that interested parties notify Commerce of support for or opposition to the petition, no

timely challenges to petitioners' standing to file the petition on behalf of the industry were filed.

Gray portland cement, the merchandise under investigation, is a hydraulic cement and sets under water. It is the primary component of concrete which is one of the principal building and construction materials used in the United States. It is also widely used in Japan in construction and public works projects. Clinker, an intermediate material produced when manufacturing cement, has no use other than grinding into finished cement.

Commerce determined that microfine cement was outside the scope of the investigation. Oil well cement was included within the scope of the investigation.

On July 2, 1990, Commerce presented questionnaires to Onoda and Nihon, as respondents, who combined accounted for more than 60 percent of exports by volume to the United States during the period of investigation ("POI").

For both Onoda and Nihon, Commerce compared United States sales of bulk cement to home market sales of bulk cement when investigating whether the imported merchandise was dumped by either respondent. For Onoda, Commerce also compared United States sales of cement, which was further manufactured into ready-mix, to home market sales of bulk cement, and United States sales of clinker to a third country sale of clinker.

Product comparisons between imported cement and cement sold in the Japanese market were made on the basis of standards established by the American Society of Testing Materials ("ASTM") which define the technical and performance specifications for gray portland cement manufactured in the United States. Both imported and domestic gray portland cement conform to ASTM standards. The Japanese Industrial Standards ("JIS") broadly define the technical and performance specifications for gray portland cement manufactured in Japan. The JIS does not use the same nomenclature as the ASTM, and the technical and performance specifications do not coincide precisely with the relevant ASTM specifications. Furthermore, Japanese producers publish technical specifications for their own cement sold in Japan. Public Reels ("P.R.") 1–13[1] (Petition at 22) (JIS R 5210).

All of the cement exported to the United States by the respondents during the POI fell within two ASTM standards. Onoda sold both Type I and Type II cement in the United States; Nihon sold only Type II in the United States. Both respondents sold at least three types of cement in the home market during the POI: ordinary portland cement ("NC"), moderate heat cement ("MC"), and high early strength cement ("VC"). Both petitioner and respondents agreed that NC was most similar to Type I cement, and Commerce therefore made product comparisons on that basis. After an investigation of the various types of cement pro-

[1] The numbers in this citation refer to the stamped numbers of the reels containing the administrative record. The second number refers to the group of reels and the first number refers to the reel number within the group.

duced and sold in the Japanese market, Commerce determined that MC was most similar to Type II for comparison purposes.

To determine whether sales of cement and clinker from Japan to the United States were made at less than fair value, Commerce compared the United States price ("U.S. price") to the foreign market value.

For Onoda, Commerce based U.S. price on purchase price where sales were made directly to unrelated parties prior to importation into the United States, in accordance with 19 U.S.C. § 1677a(b) (1988). Where sales to the first unrelated purchaser took place after importation into the United States, Commerce based the U.S. price on exporter's sales price ("ESP") in accordance with 19 U.S.C. § 1677a(c) (1988). For Nihon, Commerce based U.S. price on purchase price because all sales were made directly to unrelated parties prior to importation into the United States.

For Onoda, Commerce calculated purchase price based on f.o.b. Japanese port prices. In accordance with 19 U.S.C. § 1677a(d) and (e), deductions and additions were made where appropriate.

Onoda's ESP sales were made through a joint venture between Onoda and Lone Star Industries, Inc. ("Lone Star") called Lone Star Northwest ("LSNW"), located in Seattle, Washington. There were other channels of distribution for Onoda cement sold in the United States. Confidential Reels ("C.R.") 4–13.[2] (Onoda's Aug. 20, 1990 Section A Response at 8–10). However, only the cement which passed through LSNW is relevant for the purposes of this opinion.

The record shows that LSNW was created to import Onoda cement. The record also indicates that LSNW was both a manufacturing and selling operation. LSNW used cement imported from Onoda to manufacture ready-mix for sale to unrelated customers, and also resold cement imported from Onoda. P.R. 2–13 (Administrative Hearing Tr. at 40–41).

The record shows that during the POI, there were four channels of distribution for Onoda cement sold through LSNW. First, LSNW sold Onoda cement in bulk to an unrelated cement producer in Washington state. P.R. 2–13 (Administrative Hearing Tr. at 41). Second, LSNW sold ready-mix containing Onoda cement to unrelated customers in Washington. *Id.* Third, LSNW sold Onoda cement to unrelated customers in Oregon state. *Id.* Fourth, LSNW sold ready-mix containing Onoda cement to unrelated customers in Oregon. *Id.*

The record shows that Onoda transported its cement from its Japanese plant to LSNW by ship. The cement was transferred from the ship to terminal facilities in Seattle and Portland before further shipment or processing in the United States. C.R. 4–13 Onoda's Aug. 20, 1990, Section C Response at 4). Onoda claimed United States terminal costs as movement charges. Based on its findings at verification, Commerce, however, determined that these costs were pre-sale warehousing

[2] The numbers in this citation refer to the stamped numbers of the reels containing the administrative record. The second number refers to the group of reels and the first number refers to the reel number within the group.

expenses and, therefore, were more appropriately classified as indirect selling expenses.

Onoda's ESP sales were calculated based on c.i.f. picked up or delivered prices. Commerce then made deductions and additions where appropriate.

For ready-mix sales from LSNW, Commerce deducted all increased value resulting from the further manufacturing performed on the imported merchandise after its importation into the United States, pursuant to 19 U.S.C. § 1677a(e)(3) (1988). This increased value comprised two parts: (1) The costs associated with the production and sale of ready-mix, other than costs associated with the imported merchandise, and (2) a proportional amount of profit or loss related to the increased value. Commerce determined that further manufacturing costs included (1) The costs of manufacture (cost of materials and the related labor and overhead costs), (2) movement charges, and (3) general expenses, including selling, general and administrative expenses and interest expenses.

The record shows that [ ] Lone Star and one of its subsidiaries contributed assets to LSNW consisting of ready mix concrete manufacturing facilities, aggregates, cement terminals, and a building materials distribution operation in Washington, Oregon, and Alaska. This [ ] C.R. 4–13 (Onoda's Aug. 20, 1990, Section C Response at 25).

The record shows that in order to finance the creation of the joint venture, Onoda and Lone Star arranged on [ ] *Id.*

[.] *Id.*

Commerce included these [ ].

The record also shows that due to the location of the ready-mix plant in the Pacific Northwest, the ready-mix market was subject to seasonal fluctuations. The operation experienced seasonal swings in its level of sales and therefore in its production levels. Consequently, capacity utilization varied substantially between the cold and warm seasons. P.R.2–13 (Administrative Hearing Tr. at 62–65). Based on the information gathered, Commerce annualized LSNW's cost of further manufacturing.

For Nihon, Commerce calculated purchase price based on the f.o.b. Japanese port price. Commerce made deductions and additions where appropriate.

In accordance with 19 U.S.C. § 1677b (1988), Commerce calculated foreign market value for Onoda based on home market prices or third country prices, as appropriate. For Nihon, Commerce calculated foreign market value based on home market sales prices.

For Onoda, Commerce calculated foreign market value of cement sales based on ex-factory, c.&.f. terminal or delivered prices to unrelated and related customers in the home market.

The record shows that Onoda sold cement throughout Japan and that sales were made in a variety of ways. Onoda thus had sales to various cement producers as well as to its distributors. Onoda also made direct

sales to the end-user. C.R. 4–13 (Onoda's Aug. 20, 1990 Section A response at 13–16).

The record shows that cement from Onoda's four Japanese cement production plants was usually shipped by tanker to approximately 95 service stations owned by Onoda and located throughout Japan. The record further indicates that the cement was shipped from the service stations by truck or occasionally by rail to the end-user, or picked up at the service station by truck by the end-user. C.R. 4–13 (Onoda's Aug. 20, 1990 Section A response at 5–6).

For comparisons to purchase price sales, Commerce made deductions where appropriate. Commerce, however, did not make a deduction for home market terminal costs as claimed by Onoda. Based on its findings at verification, Commerce determined that these costs were pre-sale warehousing expenses and, therefore more appropriately classified as indirect selling expenses.

For comparisons to ESP sales, Commerce made further deductions for home market indirect selling expenses, comprised of among other costs, service station costs associated with distribution. Commerce capped the amount deducted from home market indirect selling expenses by the amount of indirect selling expenses incurred on sales in the United States market in accordance with Commerce's regulations. 19 C.F.R. § 353.56(b)(2) (1988). For ESP sales of ready-mix, Commerce computed the amount of the cap based on the portion of indirect selling expenses attributable to the subject merchandise.

For Nihon, Commerce calculated foreign market value based on c.&.f. terminal or delivered prices to related and unrelated customers in the home market.

In its August 27, 1990 questionnaire responses, Nihon reported that it was related to three Japanese cement producers. These were Myojo Cement Co., Ltd., ("Myojo"), Daiichi Cement Co., Ltd. ("Daiichi") and Ryukyu Cement Co., Ltd. ("Ryukyu").

The parties concede that Nihon owned a majority share of stock in Myojo and that Nihon owned a minority share of stock in Ryukyu. They do not, however, agree on what percentage of stock Nihon owned in Daiichi.

The parties concede that the boards of directors of Nihon and Myojo shared members and that Nihon and Daiichi did not. Ryukyu and Nihon also had interlocking directors.

The parties admit that Myojo, Daiichi and Nihon sold their cement through a joint sales company, Daichon Distribution Company. Ryukyu was not in the joint sales company with Daiichi, Myojo and Nihon.

The parties concede that Ryukyu did not have any consignment agreements with Nihon, but that Daiichi and Myojo did.

Commerce collapsed Nihon, Daiichi and Myojo, calculating a single dumping margin for the three entities. For sales made by Daiichi and Myojo, Commerce based foreign market value on best information available. Deductions were made where appropriate.

The Commission issued its affirmative preliminary determination in July, 1990. *See Gray Portland Cement and Cement Clinker from Japan,* USITC Pub. 2297, Inv. No. 731–TA–461 (Prelim.) (July 1990); also published at 55 Fed. Reg. 28,465 (USITC 1990).

On October 31, 1990, Commerce preliminarily determined that sales of gray portland cement from Japan were being made by Onoda and Nihon at less-than-fair value. *Gray Portland Cement and Clinker from Japan,* 55 Fed. Reg. 45,831 (Dep't Comm. 1990).

During January, 1991, Commerce verified the questionnaire responses of Nihon and Onoda.

The Commission issued a three to one final affirmative determination in April, 1991. *Gray Portland Cement and Cement Clinker from Japan,* USITC Pub. 2376, Inv. No. 731–TA–461 (1991); also published at 56 Fed. Reg. 21,391 (final) (1991), as amended 56 Fed. Reg. 22,053 (1991).

In its final determination, the Commission found that gray portland cement and clinker have a low value-to-weight ratio. P. R. 1–13 (Commission Report at 16–17). Transportation costs were found to be high relative to price. These high transportation costs meant that cement and clinker tend to be produced and marketed locally. *Id.* The Commission found that inventory times are very short due to the fact that storage of hydraulic cement is comparatively expensive. *Id.* at 25.

On March 22, 1991, Commerce published its final determination of sales at less-than-fair value.

On May 10, 1991, following the Commission's final affirmative injury determination, Commerce published an antidumping order covering gray portland cement from Japan, and an amended final determination of sales at less-than-fair value to find 84.70 percent and 45.29 percent weighted-average dumping margins for Nihon and Onoda respectively. For the category "all others", the dumping margin was set at 63.73. *Gray Portland Cement and Clinker from Japan,* 56 Fed. Reg. 21,658 (1991) (antidumping duty order).

Plaintiffs Onoda, Nihon and Ad Hoc each filed separate complaints before this court challenging several aspects of Commerce's determinations. The court consolidated all three actions together on November 4, 1991 under court number 91–06–00425.

Before discussing the contested aspects of Commerce's methodology, the court will dispose of the request by Commerce for remand to determine the appropriate portion of total LSNW G&A expenses to attribute to Channel 3 sales of bulk cement imported from Onoda and sold through the Oregon Division of LSNW. Commerce agrees with Onoda's claim that it erred in deducting LSNW's corporate G&A expenses when calculating the U.S. price for Channel 3 sales. These expenses were incurred to manufacture and to sell cement. Therefore they may not be treated as selling expenses. The court remands this part of the determination to Commerce for recalculation.

DISCUSSION

1. STANDARD OF REVIEW

In challenges to final determinations in antidumping investigations, the type of action under review here, the statute provides that the court must sustain Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988).

The Supreme Court has stated that the evidence required to support an agency's decision under the substantial evidence standard is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477. The possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's finding from being supported by substantial evidence. *Consolo v. Federal Maritime Com.,* 383 U.S. 607, 620 (1966). It is not the court's function to decide that it would have made another decision on the basis of the evidence. *Matsushita Elec. Indus. Co. v. United States,* 3 Fed. Cir. (T) 44, 54, 750 F.2d 927 (1984). The court will affirm Commerce's determination if it is reasonable and supported by the record as a whole, even where there is evidence which detracts from the substantiality of the evidence. *Atlantic Sugar, Ltd. v. United States,* 2 Fed. Cir. (T) 130, 136, 744 F.2d 1556, 1563 (1984). This standard of review accords deference to Commerce's conclusions.

This court is, however, statutorily mandated to review whether Commerce's determination is "otherwise not in accordance with the law". The court must thus determine whether the agency acted within the limits of its statutory mandate. Statutory interpretation begins with the language of the statute itself. "If the intent of Congress is clear [from the language of the statute], that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Chevron U.S.A. Inc. v. National Resources Defense Council Inc.,* 467 U.S. 837, 842–843 (1984) (footnote omitted) ("Chevron"). The "traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Serampore Indus. Pvt., Ltd. v. United States Dept. of Commerce, International Trade Admin.,* 11 CIT 866, 869, 675 F. Supp. 1354 (1987) (quoting *Board of Governors of Federal Reserve System v. Dimension Financial Corp.,* 474 U.S. 361 (1986)).

It is only "if the statute is silent or ambiguous with respect to the specific issue, [that] the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Chevron* at 843.

II. ISSUES PRESENTED FOR REVIEW

A. *Such or Similar Merchandise:*

The antidumping statute provides that foreign market value should be determined from home market sales of "such or similar" merchan-

dise. 19 U.S.C. § 1677b(a)(1)(A) (1988). "Such or similar" merchandise is defined in 19 U.S.C. § 1677(16) (1988) as:

> * * * merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:
>
> (A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise –
>
> (i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,
>
> (ii) like the merchandise in component material or materials and in the purposes for which used, and
>
> (iii) approximately equal in commercial value to that merchandise.
>
> (C) Merchandise –
>
> (i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,
>
> (ii) like that merchandise in the purposes for which used, and
>
> (iii) which the administering authority determines may reasonably be compared with that merchandise.

The merchandise must meet one of these three tests. According to the provision, the first test is preferred over the second, and the second test is preferred over the third.

The first test is the most stringent because it requires that the product be identical to the product being sold in the United States. The second and third tests are, however, increasingly broad. The second test is threefold and requires an evaluation of component materials, use and value, while the third test gives Commerce wide discretion to determine when products may be reasonably compared based on their use even if materials and value differ.

Plaintiff Ad Hoc objects to Commerce's decision that moderate heat cement sold in Japan is similar to Type II cement sold in the United States within the meaning of Section 1677(16)B.

B. *Adjustment Methodology:*

In an antidumping duty investigation, Commerce is charged with (determining whether "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value. * * *" 19 U.S.C. § 1673(1) (1988). Commerce imposes a duty equal to the amount by which the U.S. price of merchandise is less than the foreign market value of the merchandise. 19 U.S.C. § 1673 (1988).

The U.S. price is defined at 19 U.S.C. § 1677a(a) (1988) as "the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate." The provision defines purchase price as:

> the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the manufacturer or producer of the merchandise for exportation to the United States. Appropriate adjustments for costs and expenses under subsection (d) of this section shall be made if they are not reflected in the price paid by the person by whom, or for whose account, the merchandise is imported.

19 U.S.C. § 1677a(b) (1988).

The exporter's sales price is defined as "the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter, as adjusted under subsections (d) and (e) of this section." 19 U.S.C. § 1677a(c) (1988).

Title 19 of the United States Code, Section 1677b(a)(1) (1988) defines the foreign market value as:

> the price, at the time such merchandise is first sold within the United States by the person for whom (or for whose account) the merchandise is imported * * *.
>
> (A) at which such or similar merchandise is sold * * * in the usual commercial quantities and in the ordinary course of trade for home consumption. * * *.

Before comparing the U.S. price with the foreign market value, Commerce makes a number of deductions and adjustments to the prices in the two markets. 19 U.S.C. §§ 1677a–1677b (1988). The role of these adjustments is to account for differences between the foreign market merchandise and the United States merchandise or the circumstances under which they are sold by making additions to or deductions from the observed U.S. price and the observed foreign market price, and in so doing derive prices between which fair comparisons can be made. *Smith-Corona Group v. United States,* 2 Fed. Cir. (T) 60, 713 F.2d 1568 (1983), *cert. denied,* 465 U.S. 1022 (1984). *("Smith-Corona"). See also Zenith Electronics Corporation, v. United States,* No. 92–1043, –1044, –1045, –1046 (Fed. Cir. Mar. 19, 1993) *("Zenith").*

Plaintiffs claim that Commerce made several errors in determining and adjusting the U.S. price and the foreign market value of the cement.

Specifically, plaintiff Ad Hoc objects to Commerce's decision to use annualized fixed costs to calculate LSNW's costs of further manufacturing cement from Onoda because LSNW's fixed costs experienced significant seasonal fluctuations and were significant enough to affect the cost of ready-mix cement.

Ad Hoc objects to Commerce's decision to deduct Onoda's and Nihon's pre-sale movement expenses from the observed price.

Onoda objects to Commerce's treatment of Onoda's costs of operating its service stations that are a part of its distribution system in the Japanese market as warehousing expenses rather than as movement expenses.

Finally, Onoda objects to Commerce's decision to include the interest paid on all loans by LSNW in calculating LSNW's costs of further manufacturing cement imported from Onoda.

C. *Use of Best Information Available:*

When a respondent does not supply the information requested by Commerce in a timely manner, or provides incomplete information, the statute and Commerce's regulations allow (and, in certain circumstances, require) Commerce to use information that has not been provided by the respondent in question. Such information is referred to as best information available ("BIA"). The relevant statutory provision provides:

> In making [antidumping duty] determinations [Commerce] shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

19 U.S.C. § 1677e(c) (1988).

Commerce is furthermore required to verify all information used in its final determinations according to 19 U.S.C. § 1677e(b) (1988). The Statute provides that Commerce is to use BIA if it is unable to verify the accuracy of the information submitted. According to Commerce's regulations:

> (a) *Use of best information available.* The Secretary may use the best information available whenever the Secretary:
> (1) Does not receive a complete, accurate, and timely response to the Secretary's request for factual information; or
> (2) Is unable to verify, within the time specified,the accuracy and completeness of the factual information submitted.
> (b) *What is best information available.* The best information available may include the factual information submitted in support of the petition or subsequently submitted by interested parties, as defined in [the regulation]. If an interested party refuses to provide factual information requested by the Secretary or otherwise impedes the proceeding, the Secretary may take that into account in determining what is the best information available.

19 C.F.R. § 355.37 (1992).

Courts have affirmed Commerce's broad discretion with regard to when the use of BIA is appropriate and what should be used as BIA. *Olympic Adhesives, Inc. v. United States,* 8 Fed. Cir. (T) ____, 899 F.2d 1565, 1571–72 (1990). Commerce's discretion is, however, not unlimited in either respect. Courts have, for example, found Commerce's resort to BIA to be arbitrary and an abuse of discretion where the respondent failed to give information because the information did not and could not exist. *Id.* Commerce must also properly instruct the respondent as to the information requested. *Daewoo Elect. Co. v. United States,* 13 CIT 253, 266, 712 F. Supp. 931 (1989).

Plaintiff Nihon objects to Commerce's-use of BIA based on Nihon's failure to report home market sales for related parties Myojo and Daiichi because Myojo and Daiichi were separate legal entities, and data relating to Myojo and Daiichi was unavailable to it.

III. Analysis of the Issues Presented for Review

A. *Such or Similar Merchandise:*

The court first addresses Ad Hoc's argument that Commerce's decision to compare moderate heat cement sold in Japan to Type II cement sold in the United States was not based on substantial evidence and was not in accordance with the law.

In its final determination, Commerce based its product match on 19 U.S.C. § 1677(16)(B) (1988) which provides that "such or similar" merchandise means:

> (B) Merchandise –
>
> (i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,
>
> (ii) like the merchandise in component material or materials and in the purposes for which used, and
>
> (iii) approximately equal in commercial value to that merchandise.

Commerce concluded that the appropriate product match for United States sales of Type II merchandise was moderate heat cement. In its determination, Commerce stated that:

> [t]he statute directs the Department to select the most similar product match in terms of materials and use, among other criteria (section 771(16)(ii) of the Act). * * * The key to proper analysis under section 771(16)(B)(ii) is identification of the properties a U.S. contractor desires when requesting Type II cement.

56 Fed. Reg. 12156, 12160

Plaintiff Ad Hoc contends that Commerce erred in comparing Type II cement to moderate heat cement. Commerce also erred in its determination because it only cited to § 1677(16)(8)(ii) (1988). Section 1677(16)(B)(ii) covers similarities in characteristics and uses between the home market and exported products. Plaintiff points out that Commerce's final determination contains no discussion of whether moderate heat cement and Type II cement are "approximately equal in commercial value." 19 U.S.C. § 1677(16)(B)(iii) (1988). According to plaintiff, the statute requires that all three criteria contained in Section 1677(16)(B) be satisfied, including the requirement that the merchandise be "approximately equal in commercial value." 19 U.S.C. § 1677(16)(B)(iii) (1988). Plaintiff argues that since Commerce's final determination did not even address the third criteria of 1677(16)(B), Commerce's determination must be reversed.

In some cases the court will defer to Commerce's (determination, but the court "cannot defer to a decision which is based on inadequate analysis or reasoning." *USX Corp. v. United States,* 11 CIT 82, 88, 655 F.

Supp. 487 (1987). As the court has frequently noted, Commerce must set out the reasons for its determinations in sufficient detail to allow the reviewing court to discern the basis for its determination. *See Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962).

Because Commerce only addressed Section 1677(B)ii and failed to discuss the remaining two factors in its product comparison analysis, the court cannot determine whether its decision was supported by substantial evidence. Consequently, the court remands Commerce's decision and directs Commerce to articulate its determinations, with its underlying reasoning, regarding every element of 19 U.S.C. § 1677(16)(B) (1988). Because the court remands the case to Commerce on this basis, the court need not at this time address the arguments put forward by plaintiff that Commerce's "such or similar" determination was not supported by substantial evidence and otherwise not in accordance with the law.

B. *Adjustment Methodology:*

1. *Use of Annualized Fixed Costs to Calculate LSNW's Costs of Further Manufacturing:*

According to 19 U.S.C. § 1677a(e)(3) (1988), the exporter's sales price shall be reduced by:

> any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.

In the case at bar Commerce used annualized fixed costs to calculate LSNW's cost of further manufacturing the imported cement into ready-mix, stating:

> We have examined the record and determined that LSNW's fixed costs are significant enough to affect the per metric ton cost of ready-mix when cement and concrete sales are seasonal in nature.

56 Fed. Reg. at 12165–12166.

Plaintiff Ad Hoc contends that basing the value added adjustment upon annual cost, rather than upon actual costs incurred during the POI, was contrary to the law and an abuse of discretion. Ad Hoc argues that because Commerce used annual cost data to calculate the United States value added deduction, the ESP was an annual averaged U.S. price. Ad Hoc argues that the U.S. price must be determined on a transaction-by-transaction basis and not on an averaged basis, which could potentially mask dumping.

The court begins its analysis by determining that the statutory language does not address the specific issue before us. However, "[a]s long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not * * *

question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 404–405, 636 F. Supp. 961 (1986), *aff'd,* 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987).

The court deems that annualizing costs was a permissible method in the case at bar. Substantial evidence on the record supports Commerce's conclusion that LSNW's production of ready-mix was characterized by high fixed costs and seasonal swings in the level of capacity utilization. *See generally* P.R. 2–13 (Administrative Hearing Tr. at 62–65) (discussing the seasonal nature of the market and the high fixed costs of the ready-mix operations). At verification, Commerce documented that [ ] Commerce verified the company's calculation of annual costs of manufacturing (i.e. materials, labor and overhead). *Id.* at 24–31.] Per unit costs were very low when the industry was operating at full capacity and very high when the industry had substantial unused capacity.

The court agrees with Commerce that given substantial evidence of high fixed costs and fluctuating capacity utilization as in the instant case, it is reasonable that the exporter can argue that costs computed on the basis of a seasonally low level of utilization are overstated. Conversely, plaintiff can argue that costs should not be allocated on the basis of a period of peak capacity utilization because such costs would be understated.

Furthermore, Commerce's method in the instant case of using annualized fixed costs on a transaction basis did not mask dumping, as claimed by Ad Hoc, as price averaging would. The court agrees with Commerce that calculating the price for each transaction using the same value added adjustment did not constitute "averaging" of the U.S. price. Commerce adeptly demonstrated the difference between averaging prices and making an adjustment based on average costs in the following example contained in its submissions:

> Assume there are three export sales to the [United States], each for one widget, with prices of $8, $12, and $16, respectively. The "average" U.S. price is $12 ($36/3). Use of the average price masks the price fluctuations, and could potentially mask dumping. In contrast, assume that each of those widgets is subject to further manufacture in the [United States]. For purposes of calculating ESP, the average cost of further manufacture in the [United States] is determined to be $2/widget. The ESP for each transaction would, therefore, be $6, $10, and $14, respectively.

Defendant's Memorandum in Partial Opposition at 35 n. 17.

Finally, the court finds that Commerce's methodology is consistent with its previous practice. When calculating a value, whether it be foreign market value, cost of production or United States value added, it is not unusual for Commerce to use average costs. Commerce thus measures costs for a period other than the POI when that will achieve a more accurate estimate of actual costs of production. *See e.g., Cellular Mobile Telephones and Subassemblies From Japan,* 55 Fed. Reg. 29394 (1990)

(final admin. review). (In calculating the United States value added, start-up costs for United States production were allocated over the projected life cycle of the product.)

The court, therefore, concludes that Commerce's approach was a reasonable exercise of its discretion based upon the facts in the instant case, and that its conclusion was supported by substantial evidence on the record.

2. *Movement Expenses:*

The court now addresses Ad Hoc's argument that Commerce's decision to deduct Onoda's and Nihon's pre-sale movement expenses from the foreign market price was not supported by substantial evidence and was otherwise not in accordance with the law.

Commerce is required to reduce the U.S. price by any expenses "incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States. * * *" 19 U.S.C. § 1677a(d)(2)(A) (1988). No corresponding provision exists with regard to foreign market value. Under 19 U.S.C. § 1677(b)(a)(4)(B) (1988), the foreign market value may, however, be adjusted for differences in the circumstances of sale. Commerce's implementing regulation requires in general a direct relationship between the expense and the particular sale at issue before the foreign market value may be adjusted. 19 C.F.R. § 353.56 (1992).

In its final determination, Commerce calculated foreign market value of cement sales based on ex-factory prices, stating that:

> because we deducted all pre- and post-sale movement expenses incurred in transporting the plant to the point of sale in calculating [U.S.] price, we determined that a fair price-to-price comparison requires a similar deduction to [foreign market value], consistent with the Department's policy. *See Red Raspberries From Canada,* 56 Fed. Reg. 677 (January 8, 1991) and *Gray Portland Cement and Clinker From Mexico,* 55 Reg. 29244, 29251 (July 18, 1990)).

56 Fed. Reg. at 12161

Plaintiff claims that Commerce's treatment of movement expenses is not in accordance with the law. In support of its claim, Ad Hoc argues that Commerce has no inherent authority to create adjustments it feels are necessary to ensure a fair price comparison beyond those explicitly enumerated in the statute and regulations. Moreover, Ad Hoc claims that in allowing the adjustment for movement expenses incurred prior to the date of sale, Commerce is circumventing the circumstance of sale provision contained in the statute and regulation. Ad Hoc argues that Commerce has consistently found in determinations upheld by this court that only those expenses that are incurred after the date of sale of the subject merchandise are expenses directly related to sales.

Commerce concedes that it previously relied on the circumstance of sale provision in making movement adjustments to the foreign market value. Commerce also concedes that under its prior practice only expenses directly related to the subject sales are allowed. Yet, according to

defendant, while Commerce's previous reliance on the circumstance of sale provision is one possible interpretation of the antidumping duty statute, it is not the only reasonable interpretation.

Defendant states that recently, Commerce changed its prior practice of relying on the circumstance of sale provision because it recognized that in some instances this approach led to inequitable results. Reliance on the circumstance of sale provision did not allow for an accurate comparison of similar merchandise at a similar point in the chain of trade. Commerce recognized that it was in fact in certain situations comparing an ex-factory price on the United States side with an ex-warehouse or an ex-silo price on the foreign market side.

Commerce, therefore, relying on *AOC International, Inc. v. United States,* 13 CIT 716, 721 F. Supp. 314 (1989) and *Smith-Corona* at 132, adopted a more flexible approach to ensure a fair price comparison in accordance with its statutory mandate as interpreted by the courts. Under this approach, Commerce starts out with the first sale to an unrelated purchaser both in the United States market and in the foreign market. From this point, Commerce then deducts movement expenses to achieve a price at a similar point in the chain of commerce. According to Commerce, since the law prescribes that it look at the ex-factory price of the merchandise packed for delivery to the United States, movement expense adjustments to the observed U.S. price or the observed foreign market value are made to the ex-factory level in order to arrive at this common point in the chain of commerce. (Defendant's Memorandum in Partial Opposition at 47–48.)

In reviewing Commerce's methodology in the instant case, the court must discern whether Commerce has correctly applied the adjustment provisions of the statute and regulation. In *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States,* 16 CIT ____, 787 F. Supp. 208 (1992) ("Ad Hoc I") the court stated that:

> the absence of language addressing a movement deduction in the [foreign market value] statute suggests no hard and fast rule [regarding the treatment of such expenses] to the court in view of Congress' broad direction to make adjustments for differences in circumstances of sale and its lack of direction as to which exact price factors to use.

Ad Hoc at 212

The question of how to treat movement expenses thus falls into the category of issues that are not specifically addressed by the statute. In light of Congressional silence, *Chevron* directs the court to uphold Commerce's interpretation if it is reasonable within the context of the statutory purpose.

This court is not convinced by plaintiff's arguments. First, plaintiff's argument is internally contradictory. On the one hand, plaintiff denies Commerce's inherent authority to apply adjustments that it feels are necessary to achieve a fair price comparison. On the other hand, plaintiff recognizes Commerce's inherent authority to allow home market

indirect selling expense deductions in ESP comparisons as long the amount is "capped" by those indirect expenses deducted from the U.S. price. 19 C.F.R. § 353.56(b)(2)(1992) (Plaintiff Ad Hoc's Memorandum in Support of its Motion for Judgment on the Agency Record at 34.)

More importantly, however, plaintiff's position ignores the purpose of the antidumping statute and Commerce's practice, which is to derive a foreign market value and a U.S. price at a comparable point in the stream of commerce. 19 U.S.C. § 1677a(d)-(e), 1677b(a) (1988). The Federal Circuit upheld Commerce's authority to make adjustments in order to arrive at what it has called an "apples with apples" price comparison in *Smith-Corona* at 132.

In *Zenith,* the Federal Circuit emphasized that the *Smith-Corona* decision is not applicable in situations where the Act expressly provides a more specific treatment of the issue. *Zenith* at 17. The court concludes that since the antidumping duty statute is silent with regard to the disparity created between foreign market value and U.S. price with respect to movement expenses, *Smith-Corona* is applicable.

Since Commerce may properly make an "apples with apples" comparison, the next issue Commerce faces when dealing with a specific expense such as movement expenses is how to measure the amount of expense to be deducted. *Torrington Co. v. United States,* No. 93–44 (CIT Mar. 29, 1993). Commerce must measure the expense beginning at a common point in the stream of commerce at which point foreign market merchandise and United States merchandise "have not yet been differentiated. * * *" *Id.* at 33. In the case at bar, Commerce determined that this point was at the factory gates.

The court finds nothing unreasonable with Commerce's measurement of presale movement expenses ex-factory provided Commerce acts consistently in making its measurements in regard to foreign market value and U.S. price. *See Torrington* at 32–33. (Citing *Smith-Corona,* the Court upheld Commerce's calculation of foreign market inventory carrying costs from the time of production rather than the date of shipment when comparing ESP sales to foreign market sales. The court reasoned that the baseline for comparison purposes was used consistently on both sides of the equation, thus ensuring a fair price comparison.)

Moreover, in the instant case Commerce's adjustment methodology was in accordance with its current practice.

Finally, Commerce's position was recently sustained by this court in a case on point, *Ad Hoc I*

In *Ad Hoc I,* one of the issues before the court was whether pre-sale movement expenses incurred on home market sales could be deducted in calculating the foreign market value when such a deduction was specifically provided for, by statute and regulation, when calculating U.S. price only. After evaluating the same argument as put forward by plaintiff's in the instant case regarding the lack of statutory or regulatory direction for this deduction from foreign market price, the court, relying on *Smith-Corona,* reasoned that Commerce's "primary goal [in light of

Congressional silence] when generating [foreign market values] and [U.S.] prices for the purpose of a less than fair value determination is to compare 'apples to apples'". *Ad Hoc I* at 212 citation omitted) (footnote omitted).

The court accepted Commerce's explanation that "to obtain an 'apples to apples' comparison, the ex-factory price in the United States should be compared to the ex-factory, not the ex-warehouse, price in the home market." *Ad Hoc I* at 213.

Plaintiff seeks to distinguish the case at bar from the facts in *Ad Hoc I* by arguing that in that action, pre-sale movement expenses were incurred in both the home market and the United States market. Considering the similarity of selling procedures in both markets in that case, a fair comparison required a deduction of movement expenses on both sides. Plaintiffs contend that according to Commerce's own finding, there were no movement expenses on the United States side in the present case. *See* Plaintiff Ad Hoc's Reply Brief at 17–18. Ad Hoc argues that this difference is critical and renders the holding of *Ad Hoc I* inapplicable.

The court disagrees with plaintiff. A review of the entire opinion in *Ad Hoc I* suggests to the court that the reasoning underlying that opinion is equally applicable in the case at bar. In both cases the methodology served the goal of obtaining a fair price comparison at a common point in the stream of commerce. In both cases the ex-factory point was chosen as the appropriate baseline for measuring the movement expenses. As long as Commerce is consistent in making its measurements in regard to foreign market and United States sales, the court can find nothing wrong with the present method of measuring movement expenses.

Therefore, based on the reasons stated, the court concludes that Commerce's deduction of all pre- and post-sale movement expenses when calculating foreign market value was permissible.

3. *Service Station Costs:*

The court now examines plaintiff Onoda's contention that Commerce's treatment of Onoda's expenses of operating its service stations in the home market as warehousing expenses was not based on substantial evidence and otherwise not in accordance with the law.

Pursuant to 19 U.S.C. § 1677b(4)(B) (1988), Commerce may adjust foreign market value to compensate for any differences between foreign market value and U.S. price caused by differences in circumstances of sales in the two markets. Pursuant to this provision, Commerce established the practice of adjusting for differences in warehousing expenses.[3] *Brass Sheet and Strip from the Republic of Korea,* 51 Fed. Reg. 40833, 40834 (Dep't Comm. 1986) (final determination). Thus, whenever a difference in warehousing costs exists between a foreign market sale and a U.S. sale, Commerce makes a specific warehouse expense ad-

[3] Warehousing expenses generally encompass overhead, depreciation, and other expenses incurred in operating a warehouse.

justment to foreign market account for the differences in circumstances of sales.

According to its final determination, Commerce classified Onoda's expenses incurred in the home market for service stations as warehouse expenses stating that:

> based on the nature of service station functions, and costs, we determined that these costs are more appropriately classified as warehousing expenses and, for Onoda, have treated them as indirect selling expenses for purposes of the final determination. *See Phosphoric Acid from Israel,* 52 FR 25440, 25442 (July 7, 1987).

56 Fed. Reg. at 12161.

For comparisons to ESP sales, Commerce made deductions for home market indirect selling expenses comprised of service station costs. The amount was capped by the amount of indirect selling expenses incurred on sales in the United States market, in accordance with Commerce's regulations. 19 C.F.R. § 353.56(b)(2) (1992). For ESP sales of ready-mix cement produced by Onoda's related importer after importation, Commerce computed the amount of the cap based on the portion of indirect selling expenses attributable to the subject merchandise. Commerce did not allow for any deductions in purchase price sales.

Onoda contends that service station charges incurred by Onoda in the home market should be treated as movement expenses and not as warehouse expenses. Alternatively, Onoda contends that, if the court finds that Commerce properly determined that the operating costs of Onoda's service stations were warehousing expenses, then these expenses should be treated as direct expenses, rather than as indirect expenses.

According to Onoda's understanding, "warehouses" are used to store a product before distribution to a customer. As support, Onoda cites *Webster's Ninth New Collegiate Dictionary,* 1328 (1988) which defines a warehouse as "a structure or room for the storage of merchandise or commodities."

Onoda contends that the service stations at issue were not used to store cement. In Onoda's view, this is demonstrated conclusively by the very short total inventory time experienced by Onoda in its home market sales.

While Onoda concedes that the cement was not physically moved while it was within the terminal itself, it does not consider this fact dispositive in the instant case. According to Onoda, the expenses qualify as movement expenses because the service stations were used as transfer points and as such were integral links in Onoda's home market distribution system.

Onoda argues that historically, Commerce and this court have taken a wide view of what constitutes a "movement" expense. Movement expenses are not just limited to the actual physical movement of a product, but also to all related expenses incurred incidental to the movement of the subject merchandise. Onoda concludes that the same principle applies equally in the present case.

Finally, Onoda argues that Commerce in its final determination relying upon *Industrial Phosphoric Acid From Israel,* 52 Fed. Reg. 25440, 25442 (Dep't Comm. 1987) (final determination), to support its position. In that case, Commerce refused to allow as a movement expense expenses incurred by the respondent at its "storage facilities." Onoda claims that citing to that case begs the issue since the record in this case demonstrates that the service stations were not "storage facilities". Thus, according to Onoda, the *Industrial Phosphoric Acid* case is simply irrelevant to the present analysis.

Commerce rejected Onoda's claim that the expenses were movement expenses "based on the nature of service station functions, and costs." *(Gray Portland Cement & Clinker from Japan,* 56 Fed. Reg at 12161.) In support of its position, Commerce argues that the service stations were warehouses from which cement was sold from inventory to the end user. (Defendant's Memorandum in Partial Opposition at 52–53.) Commerce claims that the Fact that, in some instances, cement did not remain in the service stations for a long period of time before being shipped to a customer should be disregarded as irrelevant. (Defendant's Memorandum in Partial Opposition at 53.) Commerce furthermore argues that Onoda's distribution terminal costs included maintenance for the service stations and various overhead expenses, which are, according to Commerce, by their nature costs associated with operating a storage facility. (Defendant's Memorandum in Partial Opposition at 53.)

Finally, Commerce claims that the fact that Onoda's service stations are a component of Onoda's distribution system does not require Commerce to treat Onoda's service station costs as movement expenses. Relying on *Industrial Phosphoric Acid From Israel,* 52 Fed. Reg. 25440, 25442 (Dep't Comm. 1987) (final determination), Commerce contends that it has specifically rejected the treatment of warehousing expenses as movement expenses. Furthermore, in those cases in which pre-sale movement expenses were deducted from foreign market value, Commerce argues that it specifically stated that pre-sale movement expenses included only expenses related to transporting the merchandise from the factory to the warehouse. *See Red Raspberries From Canada;,* 56 Fed. Reg. 677 (Dep't Comm. 1990) (final results).

Before addressing the question of whether the decision by Commerce to classify the service stations as warehouses was not in accordance with the law and not supported by substantial evidence, the court determines that the statute does not define either the term "movement expense" or "warehouse expense".

As previously noted, where the "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron* at 843.

Consequently, the court must determine whether Commerce's decision that the expenses in the instant case were warehousing expenses

rather than movement expenses, as claimed by plaintiff Onoda, was a permissible construction of the statute as required under *Chevron*.

In reviewing Commerce's methodology, the court first notes that both the plain language of the statute and Commerce's practice support a wide interpretation on which charges qualify as movement expenses to include other expenses than freight expenses. As noted above, the statute requires Commerce to reduce purchase price or exporter's sales price by the amount, if any, included in such price, "*incident to bringing* the merchandise" to the place of delivery in the United States. 19 U.S.C. § 1677a(d)(2)(A) (1988) (emphasis added).

Furthermore, Commerce reduces the U.S. price by all amounts included in the observed price that are attributable to shipment of the merchandise from the foreign plant to the U.S. customer. These amounts can include, among other possible charges, foreign inland freight and insurance; foreign brokerage, handling and port charges; international freight (ocean, air, land) and insurance; U.S. Customs duties; U.S. brokerage, handling and port charges and U.S. inland freight and insurance. The foreign market price is similarly reduced by delivery costs included in the observed price. *See Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany,* 54 Fed. Reg. 18992, 19044 (Dep't Comm. 1989) (final determination). Thus, the fact that the service station expenses were not freight expenses does not in and of itself preclude them from being movement expenses.

Next, in determining whether Commerce's decision was reasonable the court notes that the legislative history does not contain a definition of the term "warehouse". In the light of such Congressional silence, the court may resort to extrinsic sources such as dictionaries and lexicons. *See Carlisle Tire & Rubber Co. v. United States,* 5 CIT 229, 233, 564 F. Supp. 834 (1983). The court notes that according to a standard dictionary definition, the plain meaning of the term "warehouse" is "a structure or room for the storage of merchandise". *Webster's New World International Dictionary* Unabridged 2576 (1986). The term "to store" is defined as "to put aside, or accumulate, for use when needed". *Webster's New World Dictionary* 1322 (3d College ed. 1988). Consequently, the court determines that a "warehousing expense" is an expense associated with putting aside merchandise in a structure or room for use when needed.

Based on the above, the court concludes that the subject expenses must be classified as warehousing expenses if the stations actually were being used to put aside cement for use when needed. If, on the other hand, the cement was merely residing in the service stations "incident to bringing" the cement from one location to another, the expenses must be considered as movement expenses. 19 U.S.C. § 1677a(d)(2)(A) (1988). *See also Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany,* 54 Fed. Reg. 18992, 19044 (Dep't Comm. 1989) (final determination).

The court recalls that Commerce "is obligated to weigh all the pertinent evidence gathered in an investigation in reaching [its] determination" regarding the true nature of the service station expenses. *Roses, Inc. v. United States,* 13 CIT 662, 665, 720 F. Supp. 180 (1989) (citation omitted). Moreover, the agency must "'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.'" *Burlington Truck Lines, Inc., v. United States,* 371 U.S. 156, 168 (1962) (quoting *Phelps Dodge Corp. v. Labor Board,* 313 U.S. 177, 197 (1941)).

Accordingly, Commerce's finding as to the proper classification of the service station expenses must be based on a substantive analysis of all the factors suggesting their true nature. Factors indicating the actual use of the facility in the present case, such as the type of facility, whether the facility was movable, i.e. had wheels, was a ship, the process the merchandise was undergoing, the length of time involved, as well as other factors must be taken into account. Only then will Commerce's analysis meet the test of "reasonableness" as required under *Chevron.*

In the instant case, Commerce, however, limited its discretion in an unreasonably rigid, mechanical manner, placing form over substance. Here Commerce only looked at factors that related narrowly to the facility itself, i.e. the nature of the facility and that the costs incurred were overhead costs. Commerce did not consider other relevant factors such as the length of time involved. Clearly, the court cannot condone such a narrow analysis. The court "cannot defer to a decision which is based on inadequate analysis or reasoning." *USX Corp. v. United States,* 11 CIT 82, 88, 655 F. Supp. 487 (1987).

By adopting this limited approach, Commerce failed to realize the overriding statutory purpose which is to achieve a fair price comparison based on the peculiarities of the industry under investigation. *Smith-Corona* at 132. *See also Zenith.* Furthermore, since the result of Commerce's analysis was determinative of whether a deduction of the expenses would be allowed in full or only up to the ESP cap, its treatment of the service station expenses had a potentially significant impact on the fair value calculation.

It is the court's view that several factors contained in the administrative record indicate that the service stations might in reality have functioned as transfer points rather than as warehouses for storing cement in this particular case.

First, due to the fact that Onoda's home market was made up of many islands and that production and demand were geographically dispersed, Onoda used a combination of sea and land transportation to move its cement. Next, the fact that cement and clinker have a low weight-to-value ratio meant that a combination of sea and land transportation would reduce Onoda's transportation expenses, making its cement more competitive. P.R. 2–13 (Administrative Hearing Tr. at 44).

Onoda's use of a combination of different modes of transportation to move cement meant that the cement had to be transferred from ship to rail or truck. The service stations might have been such transfer points.

Plaintiff, Ad Hoc concedes that portland cement is hygroscopic, that is very sensitive to contact with water. Because gray portland cement and water form concrete, gray portland cement must be handled and stored in a manner which minimizes the possibility of contamination by water. Thus, both domestic producers and importers must use some type of enclosed system or storage silo and relatively sophisticated equipment to store and transport gray portland cement. P.R. 1–13 (Petition at 13).

The court finds that the fact that the cement was generally sold in bulk even though it is very sensitive to contact with water indicates that very careful handling was required during the transfer process from ship to rail or truck. Use of a separate facility such as the service station during the transfer process might indeed under such circumstances have been necessary and incident to moving the merchandise.

Finally, although the record is not conclusive as to the actual amount of time the cement spent in the facilities, it is clear that the time was very short P.R. 2–13 (Administrative Hearing Tr. at 48). This indicates that the level of cement production was carefully geared to meet the actual level of demand, and that cement was therefore moved through the service stations on a continuous basis and not stored awaiting sale to the end user. *Id.*

Based on the above reasoning, the court concludes that Commerce's determination was not reasonable and therefore not in accordance with the law. The court remands the determination to Commerce with instructions to conduct a substantive investigation as to whether the service stations acted as warehouses or transportation facilities. In this analysis, Commerce is directed to evaluate why the merchandise resided in the service stations based on all the relevant factors present, including the time involved. Having remanded on the basis of plaintiff's first argument, the court does not reach Onoda's alternative argument that if the service station expenses are viewed as "warehouses", such presale warehousing expenses should be deducted as a direct circumstance of sale adjustment.

4. *Interest Payments in Calculating LSNW (Onoda) Value Added Costs of Further Manufacturing:*

The court will now examine plaintiff Onoda's contention that Commerce incorrectly [ ].

Title 19 of the United States Code, Section 1677a(e)(3) (1988) provides that the exporter's sales price be reduced by:

> any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.

To comply with this provision of the Code, Commerce must calculate the cost of production for further manufactured merchandise and deduct that amount from the ESP. The cost of production includes the cost of manufacturing as well as general expenses, including [ ]. This methodology is in accordance with Commerce's administrative practice.

When calculating dumping margins, all parties agree that the U.S. price for LSNW's cement imports is properly calculated by using the ESP, the price to the first unrelated purchaser.

In its final determination, Commerce concluded that [ ] should be included in the calculation of LSNW's costs of further manufacturing cement purchased from Onoda. Consequently, it deducted these expenses from the U.S. price according to 19 U.S.C. § 1677a(e)(3), stating that:

> we agree with petitioners. Interest paid on all loans has been included in calculation of U.S. value added costs because the Department recognizes the fungible nature of financing.

56 Fed. Reg. at 12166.

Onoda contends that Commerce incorrectly included [ ]

In support of its claim, Onoda argues that it is Commerce's general practice not to allow an offset for interest income which is received from activities unrelated to the manufacturing process or business activity under investigation. [ ]. Onoda relies on *Sweaters Wholly or in Chief Weight of Man-Made Fiber From the Republic of Korea,* 55 Fed. Reg. 32,659 (Dep't Comm. 1990) (final determination), where Commerce excluded a respondent's interest expenses incurred for financing activities which were distinct from its manufacturing operation. Onoda also cites to *Certain Fresh Cut Flowers From Colombia,* 56 Fed. Reg. 50554, (Dep't Comm. 1991) (final admin. review) in which Commerce allowed the exclusion of costs unrelated to the selling activities of the subject merchandise.

Commerce, however, argues that pursuant to its administrative practice, such [ ] are included in the calculation of G&A expenses when calculating further manufacturing costs due to the fungible nature of financing and the impossibility of accurately tracing the exact source and use of all funds held by a corporation. As a result, Commerce analyzed total [ ] relative to total cost of goods sold.

Furthermore, Commerce argues that the facts on the record clearly show [ ]

The court first determines that the statute does not provide a definition of the interest expenses to be included for the purpose of the value added calculation. The court must thus once again turn to *Chevron* and determine whether "the agency's answer is based on a permissible construction of the statute." *Chevron,* at 843.

The court finds that Onoda has failed to provide any legal, legislative or factual support for its argument that the court should disregard long settled Commerce practice and require Commerce to exclude the [ ] incurred. First, it is not Commerce's practice to trace the use of a corpo-

ration's funds because of the fungible nature of a corporation's financial resources. *See Titanium Sponge From Japan,* 55 Fed. Reg. 42,227 (Dep't Comm. 1990) (final admin. review); *Certain Small Business Telephone Systems,* 54 Fed. Reg. at 53,152; *Antifriction Bearings,* 54 Fed. Reg. at 19075.

Second, even if Commerce were required to consider certain [ ] separately from LSNW's other [ ]

The court is not persuaded by Onoda that Commerce is required by administrative precedent to exclude from its value added calculation the [ ] attributable to the loans in question. The circumstances of the parties involved in the cases cited by Onoda are distinguishable from the facts of the instant case. The parties in *Flowers from Colombia, Titanium Sponge* and *Sweaters From Korea* were all involved in lines of business that were clearly unrelated to those under review by Commerce. Plaintiff's reliance on these cases is thus misplaced.

The court, therefore, concludes that Commerce's methodology is a permissible application of the statute, and supported by substantial evidence and sustains its determination in this regard.

C. *Use of Best Information Available:*

Finally, plaintiff Nihon challenges Commerce's reliance upon BIA in its calculation of Nihon's dumping margin. Nihon, initially argues that Commerce's decision to collapse Nihon with Ryukyu, Myojo and Daiichi because of a possibility of price manipulation by plaintiff in collaboration with its related producers was not based on substantial evidence and was not a determination based upon the facts. Plaintiff also contends that the information chosen by Commerce as BIA was improper. The court, however, does not reach this second issue because the court remands on the first issue.

In this case, Commerce based its decision to collapse the entities and use BIA for purposes of determining sales quantities and values for Myojo and Daiichi upon Nihon's failure to submit a consolidated response with information concerning Myojo and Daiichi. Commerce also contends that it was unable to verify the information that was submitted.

Plaintiff asserts that Nihon was excused from submitting a consolidated response including Myojo and Daiichi sales data because Nihon, Daiichi and Myojo were separate legal entities, and data related to Daiichi and Myojo was unavailable to plaintiff. Consequently, Commerce should not have resorted to BIA when calculating Nihon's, Daiichi's and Myojo's dumping margins.

In support of their contention, plaintiff relies upon *Olympic Adhesives, Inc. v. United States,* 8 Fed. Cir. (T) ____, 899 F.2d 1565 (1990). In *Olympic,* the respondent did not provide all the data sought by Commerce in its questionnaire because the requested data did not exist. Commerce characterized this response as a refusal to provide the requested data and relied upon BIA. The Court of Appeals for the Federal Circuit held that use of BIA was not justified simply because the respon-

dent's full and complete answers to Commerce's questionnaire did not "definitely resolve the overall issue presented." *Id.* at 1574.

"However, plaintiff's reliance on *Olympic* rests upon the assumption that the information sought by Commerce was unavailable to plaintiffs because [Nihon, Daiichi and Myojo] were in fact separate legal entities." *Tianjin Machinery Import & Export Corp. v. United States,* 16 CIT ___, 806 F. Supp. 1008, 1013. The court's first inquiry must therefore be whether substantial evidence supports Commerce's determination that plaintiff was not independent from Daiichi and Myojo.

"It is the Department's general practice *not* to collapse related parties except in certain relatively unusual situations, where the type and degree of relationship is so significant that we find there is a strong possibility of price manipulation." *Antifriction Bearings (Other than Tapered Bearings) and Parts Thereof from the Federal Republic of Germany,* 54 Fed. Reg. 18992, 19089 (1989) (final determination) (citation omitted).

In determining whether to collapse entities, Commerce does not focus solely upon the degree of voting control one company may have over another, but upon a broad analysis of the facts in the case. In addition, as Commerce stated in *Cellular Mobile Telephones And Subassemblies from Japan,* its determination to collapse related entities is not "based solely on the extent of their financial relationship." 54 Fed. Reg. 48011, 48015 (Dep't Comm. 1989) (final admin. review). Other factors relied upon by Commerce in collapsing related companies are that (1) the companies are closely intertwined; (2) transactions take place between the companies; (3) the companies have similar types of production equipment, such that it could be unnecessary to retool either plant's facilities before implementing a decision to restructure either company's manufacturing priorities; and (4) the companies involved are capable, through their sales and production operations, of manipulating prices or affecting production decisions. *Certain Granite Products from Spain,* 53 Fed. Reg. 24335, 24337 (Dep't Comm. 1988) (final determination); *Certain Granite Products from Italy,* 53 Fed. Reg. 27187, 27189 (Dep't Comm. 1988) (final determination); *Steel Wheels from Brazil,* 54 Fed. Reg. 8780, 8781 (Dep't Comm. 1989) (prelim. determination). All of these factors need not be present as long as the parties are sufficiently related to present the possibility of price manipulation. *Cellular Mobile Telephones and Subassemblies from Japan,* 54 Fed. Reg. 48011, 48015 (Dep't Comm. 1989) (final admin. review).

Here, in its final determination, Commerce stated:

> it is clear that Nihon controls a substantial interest in Myojo and Daiichi, [and thus] we determine that there is a reasonable basis to believe that collapsing Nihon and its related parties Myojo and Daiichi is warranted.

56 Fed. Reg. 12167

Although Commerce concedes that its determination to collapse all three entities had to be based on the standards set forth above, the final

determination does not contain any information as to why it was "clear" to Commerce that "Nihon controls a substantial interest in Myojo and Daiichi." It does not explain why there was a "reasonable basis to believe that collapsing Nihon and its related parties Myojo and Daiichi [was] warranted." The determination does not indicate the criteria or the evidence relied upon in reaching such a conclusion.

The court finds it important to emphasize that an agency "must make findings that support its decision, and those findings must be supported by substantial evidence." *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962). The agency "must articulate [a] rational connection between the facts found and the choice made." *Id.* at 168. Any determination that the use of BIA was appropriate must therefore contain findings that the parties are sufficiently related to present the possibility of price manipulation based on the criteria developed in Commerce's practice.

Commerce's determination, however, failed to include any discussion or evidence whatsoever showing that (1) the companies were closely intertwined; (2) transactions took place between the companies; (3) the companies had similar types of production equipment, such that it would be unnecessary to retool either plant's facilities before implementing a decision to restructure either company's manufacturing priorities; and (4) the companies involved were capable, through their sales and production operations, of manipulating prices or affecting production decisions. While each of these criteria did not have to be met, Commerce did have to consider them all. *See Cellular Mobile Telephones and Subassemblies from Japan,* 54 Fed. Reg. 48011, 48015; *Certain Granite Products from Spain,* 53 Fed. Reg. 24335, 24337; *Certain Granite Products from Italy,* 53 Fed. Reg. 27187, 27189; *Steel Wheels from Brazil,* 54 Fed. Reg. 8780, 8781.

Additionally, the court independently examined the administrative record in the case at bar. The record contained some evidence of control by Nihon based upon Nihon's ownership interest in the two related companies and the fact that Nihon's and Myojo's board of directors had overlapping membership. However, the record did not include the breadth of information necessary to conclude that this was one of those "relatively unusual situations, where the type and degree of relationship is so significant that we find there is a strong possibility of price manipulation." *Antifriction Bearings (Other Than Tapered Bearings) And Parts Thereof from the Federal Republic of Germany,* 54 Fed. Reg. 18992, 19089 (Dep't Comm. 1989) (final determination) (citation omitted).

Indeed, evidence on the record did not indicate that the firms shared marketing information or production decisions. There was no indication of an intertwined management structure as was present in other cases where Commerce collapsed related entities. The fact that Myojo, Daiichi and Nihon sold their cement through a joint sales company, Daichon Distribution Company, did not in and of itself support that the

companies shared information. Neither did the fact that Nihon got commissions on the sales of Myojo and Daiichi cement in and of itself support collapsing the entities.

As argued by plaintiff Nihon, evidence on the record supports that Nihon, Daiichi and Myojo were competitors. The record contains information that had the companies shared information, they would have been subject to antitrust actions in Japan. (Plaintiff Nihon's Memorandum in Support of its Motion for Judgment on the Agency Record at 10.) Furthermore, the record includes information [ ] (Plaintiff Nihon's Memorandum in Support of its Motion for Judgment on the Agency Record at 13.)

Therefore, the court finds that the record does not establish that there is substantial evidence to support collapsing Nihon and its related companies. Commerce's margin determination is therefore remanded for recalculation. In doing so, Commerce is instructed to recalculate the margin for Nihon without including Daiichi and Myojo.

CONCLUSION

For the reasons provided above, this court holds that Commerce's final determination regarding gray portland cement and cement clinker from Japan was, in part supported by substantial evidence and in accordance with law, and, in part, was not based upon substantial evidence and not in accordance with the law, and remands to Commerce as to those relevant parts. Accordingly, Commerce's determination is sustained in part and plaintiffs' motions for remand are granted in part.

(Slip Op. 93–81)

TEXAS CRUSHED STONE CO., PARKER LAFARGE, INC., AND GULF COAST LIMESTONE, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND VULCAN MATERIALS CO., CALIZAS INDUSTRIALES DEL CARMEN, S.A., AND VULCANICA DISTRIBUTION CO., DEFENDANT-INTERVENORS

Court No. 92–08–00559

[Plaintiffs' motion for judgment upon the agency record is denied. The International Trade Commission's negative preliminary determination is sustained and the action is dismissed.]

(Dated May 25, 1993)

Stewart & Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., and *Lane S. Hurewitz),* for plaintiffs.

Office of General Counsel, United States International Trade Commission (Lyn M. Schlitt, General Counsel, *Judith M. Czako,* Acting Assistant General Counsel and *George W. Thompson,* Attorney-Advisor), for defendant.

Covington & Burling (Harvey M. Applebaum, O. Thomas Johnson, Jr., Thomas O. Barnett, and *Thomas A. Robertson),* for defendant-intervenors.

OPINION

CARMAN, *Judge:* Pursuant to Rule 56.1 plaintiffs move for judgment upon the agency record. Plaintiffs contest the negative preliminary determination of the International Trade Commission, in its investigation in *Crushed Limestone from Mexico,* 57 Fed. Reg. 31,386 (1992). This action is brought pursuant to 19 U.S.C. § 1516a(a)(1)(C) (1988) and 28 U.S.C. § 1581(c) (1988).

BACKGROUND

Texas Crushed Stone Co., Parker LaFarge Inc., and Gulf Coast Limestone, Inc. (plaintiffs) filed a petition on May 20, 1992 with the ITC and Commerce alleging that an industry in the United States was materially injured or threatened with material injury by reason of imports of crushed limestone from Mexico at less than fair value. The ITC conducted a preliminary investigation. *Crushed Limestone from Mexico,* 57 Fed. Reg. 22,255 (1992). Based on the information obtained during the investigation, the five participating Commissioners reached a negative preliminary determination.[1] *Crushed Limestone from Mexico,* 57 Fed. Reg. 31,386 (1992). The Commission's views and a public version of the staff report are set forth in *Crushed Limestone from Mexico,* USITC Pub. 2533, Inv. No. 731–TA–562 (Preliminary) (July 1992) (AR Doc. 57).

All of the Mexican crushed limestone at issue originated at the Yucatan Peninsula quarry of defendant-intervenor Calizas Industriales del Carmen, S.A. and was imported into the United States by defendant-intervenor Vulcan/ICA Distribution Company. AR Doc. 57 at I–13. Defendant-intervenor Vulcan Material Company is a domestic operator of limestone quarries throughout the United States, including the Southeastern Texas region, and owns interests in Calica and Vulcan/ICA through one of its wholly owned subsidiaries. AR Doc. 1 (Petition) at 11, *citing* Collective Exhibit 5 (Vulcan 1990 Form 10–K) at 50. Vulcan/ICA began to import crushed limestone into the U.S. market for use as construction aggregate in 1990.

In addressing the first issue of the definition of "like product," the Commissioners adopted plaintiffs' definition which included crushed limestone and excluded limestone flux, cement kiln feed, limestone used for the manufacture of lime, and agricultural limestone. AR Doc. 57 at 4–9, 17–18. The Commission also adopted the region of seventy-five counties in Southeast Texas proposed by plaintiffs in order to consider the case on a regional industry basis within the meaning of 19 U.S.C. § 1677(4)(C) (1988). AR Doc. 57 at 11–13.

The Commission next determined that there was not a concentration of dumped imports into the regional market. AR Doc. 57 at 14. In making this determination, the Commission stated that "[w]hile the statute

[1] Chairman Newquist recused himself from this investigation. The Commission majority was composed of Vice Chairman Watson and Commissioners Brunsdale and Crawford. Commissioners Rohr and Nuzum issued concurring views.

does not define concentration, the Commission generally has found concentration of dumped imports at or above 80 percent of total imports into the United States to meet the statutory criterion." AR Doc. 57 at 13 (footnote omitted). The Commission noted that in 1990, 55.1 percent of imports from Mexico were imported into the region; in 1991, 59.6 percent; and in the period January through March 1992, 54.3 percent. AR Doc. 57 at 13–14. The majority and concurring Commissioners concluded that these levels of imports did not satisfy the statutory concentration requirement. AR Doc. 57 at 13–14, 22–23. The Commission declined to consider concentration on plaintiffs' proposed alternative basis of import market share because the evidence before them demonstrated that imports were not dispersed widely throughout the country. AR Doc. 57 at 14.

Because the Commission determined that imports were not concentrated in the market, the majority did not reach the issue of material injury or threat thereof to the producers of all or almost all of the production within the market. The majority stated that a finding of import concentration was a legal prerequisite to an analysis of whether the producers of all or almost all of the production within the market were being materially injured or threatened by material injury. AR Doc. 57 at 15. The concurring commissioners on the other hand, reached the issue and stated the following:

> Having determined that the condition precedent, import concentration, to an affirmative injury finding in a regional industry investigation is lacking, we are compelled to conclude that there is no reasonable indication that producers of all or almost all of regional production are being materially injured or threatened with material injury by reason of the allegedly unfair Mexican imports.

AR Doc. 57 at 23.

CONTENTIONS OF THE PARTIES

Plaintiffs first argue that the ITC used an unlawful interpretation of 19 U.S.C. § 1677(4)(C) in making its negative preliminary determination. Plaintiffs read the statute and its legislative history as requiring the Commission to use a "ratio of import penetration analysis," an analysis plaintiffs claim the Commission abandoned in this case.

The second argument raised by plaintiffs is that the Commission departed from its prior practice by applying a higher numerical benchmark and by only using the percent of imports analysis. Plaintiffs claim that in past determinations the Commission not only used a lower numerical benchmark, but that it viewed import concentration alternatively in terms of a percentage of national imports (the percent of imports analysis) or of the relative market share (ratio of import penetration analysis).

Plaintiffs next contend the Commission misapplied the preliminary injury standard in its investigation. They claim the "ITC failed to apply the proper legal standard in the context of a preliminary determination, to wit: 'whether there is a reasonable indication that' an industry is ma-

terially injured or threatened with injury by reason of dumped imports. 19 U.S.C. § 1673b(a)." Plaintiffs' Brief at 36. Plaintiffs argue the Commission ignored evidence on the record which indicated there was a higher import concentration ratio in the Southeast Texas region than in the United States as a whole. Due to this arbitrary and capricious application of the facts, plaintiffs argue that the Commission improperly failed to proceed to a final determination.

Plaintiffs' final argument is that the Commission's finding, that there was no reasonable indication that the Southeast Texas crushed limestone industry was threatened with material injury by reason of the subject imports, was an abuse of discretion and not in accordance with law. According to plaintiffs, the Commission failed to consider extensive evidence on the administrative record which demonstrated a threat of material injury, such as: (1) Vulcan's stated intention for expanded import volume in 1992 and beyond; (2) the geographic proximity of the Southeast Texas region to the Mexican facility; and (3) the massive entry of the highest proportion of the Mexican product into the ports of the Southeast Texas region prior to the initiation of the investigations. Plaintiffs' Brief at 5–6.

Defendants argue the Commission's negative preliminary determination should be affirmed. Defendants respond to plaintiffs' first argument by stating that the Commission's interpretation of 19 U.S.C. § 1677(4)(C) was reasonable. Defendants argue that the legislative history of the provision indicates that the Commission has discretion in choosing its method for determining import concentration, and the Commission is not required to choose any particular method in its investigation. Secondly, defendants point out that neither the antidumping statute generally, the regional industry provision, nor Commission practice, binds the Commission to a precise numerical cut-off in analyzing whether import concentration is present.

Contrary to plaintiffs' assertion that the Commission failed to apply the correct legal standard and ignored evidence on the record, defendants argue that the Commission in fact considered the complete record under the appropriate legal standard in considering the issue of import concentration. Based on this full consideration, defendants assert that there was no reason for the Commission to believe that contrary evidence would arise in any final investigation. Thus, defendants claim it was unnecessary to proceed to a final investigation to consider the issue of material injury.

Defendants argue that plaintiffs' fourth and final argument is irrelevant. According to defendants, the Commission is not required to consider whether there is a threat of import concentration, either in a preliminary or a final determination. Therefore, defendants urge that there was no need for the Commission to consider the statutory threat factors that plaintiffs discuss in their brief.

STANDARD OF REVIEW

"If ITC's negative determination, however reached, was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' 19 U.S.C. § 1516a(b)(1)(A), the court should overturn it. If ITC's negative determination cannot be held defective on any of those grounds, the court should not overturn it." *American Lamb Co. v. United States,* 4 Fed. Cir. (T) 47, 58, 785 F.2d 994, 1004 (1986).

The arbitrary and capricious standard has been defined by the Supreme Court in the following manner:

> Under the "arbitrary and capricious" standard the scope of review is a narrow one. A reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment * * *. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."

Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974), *reh'g denied,* 420 U.S. 956 (1975) (citations omitted).

Additionally, "if the statute is silent or ambiguous with respect to [a] specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843, *reh'g denied,* 468 U.S. 1227 (1984) (footnote omitted).

DISCUSSION

In the course of an antidumping investigation, the ITC must determine whether, based on the best information available at the time of the determination, there is a reasonable indication of material injury or threat thereof to an industry in the United States by reason of the subject imports. 19 U.S.C. § 1673b(a) (1988). When defining "industry," the Commission may conduct a regional analysis as provided in the following statutory language:

> *Regional Industries:*
>
> In appropriate circumstances, the United States, for a particular product market, may be divided into 2 or more markets and the producers within each market may be treated as if they were a separate industry if–
>
> (i) the producers within such market sell all or almost all of their production of the like product in question in that market, and
>
> (ii) the demand in that market is not supplied, to any substantial degree, by producers of the product in question located elsewhere in the United States.
>
> In such appropriate circumstances, material injury, the threat of material injury, or material retardation of the establishment of an industry may be found to exist with respect to an industry even if the domestic industry as a whole, or those producers whose collective output of a like product constitutes a major proportion of the

> total domestic production of that product, is not injured, if there is a concentration of subsidized or dumped imports into such an isolated market and if the producers of all, or almost all, of the production within that market are being materially injured or threatened by material injury, or if the establishment of an industry is being materially retarded, by the reason of the subsidized or dumped imports.

19 U.S.C. § 1677(4)(C) (1988).

The statute sets up three prerequisites which must be satisfied before the Commission can reach an affirmative determination under a regional industry analysis. The Commission must determine that there is: (1) a regional market satisfying the requirements of the statute, (2) a concentration of dumped imports into the regional market, and (3) material injury or threat thereof to producers of all or almost all of the regional production, or material retardation to the establishment of an industry due to the subsidized or dumped imports. The Commission will move on to the next step only if each preceding step is satisfied. In this case the Commission initially determined the region proposed by plaintiffs satisfied the criteria of the statute, then next determined there was not a concentration of dumped imports into the regional market. AR Doc. 57 at 13–14.

Legislative History:

Plaintiffs first argue that the Commission failed to use the "ratio of import penetration analysis" in its determination as is required by both 19 U.S.C. § 1677(4)(C) and its legislative history. Instead the Commission used only the "percent of imports analysis." These two methods of measuring whether imports are concentrated in a given region were described in the defendant's brief as follows:

> PERCENT OF IMPORTS ANALYSIS: The Commission considers the percentage of all subject imports that are imported into the region; if the region accounts for a sufficiently large percentage of all the subject imports in light of the facts of the case, the Commission will find that the imports are concentrated and proceed with a regional industry analysis.
>
> RATIO OF IMPORT PENETRATION ANALYSIS: The Commission considers whether import penetration in the region is relatively higher than import penetration in the United States as a whole. The Commission has typically considered this alternate way of measuring concentration only in particular circumstances, such as when the imports outside the region are widely dispersed throughout the rest of the country or when the regional industry accounts for a significant portion of the total national industry, and only after considering concentration under the percentage of imports analysis.

Defendant's Brief at 16.

The Court does not agree with plaintiffs' interpretation of either the statute or its legislative history. As plaintiffs themselves point out, the statute does not define the terms "concentration" or "import concentra-

tion." Plaintiffs' Brief at 15. Furthermore, the statute does not specifically refer to either of the two tests at issue. Thus it cannot be said that the statute by its language requires the Commission to analyze every concentration issue based on the ratio of import penetration analysis.

In addition, the legislative history cited by plaintiff does not compel the Commission to use the relative market share test in every case. Plaintiffs point to a Senate Report which states the following:

> The requisite concentration will be found to exist in at least those cases where the ratio of the subsidized, or less-than-fair-value, imports to consumption of the imports and domestically produced like product is clearly higher in the relevant regional market than in the rest of the U.S. market.

S. Rep. No. 249, 96th Cong., 1st Sess. 83 (1979). A House Report, however, states "concentration *could be* found to exist if the ratio of such imports to consumption is clearly higher in the regional market than in the rest of the U.S. market." H.R. Rep. No. 317, 96th Cong., 1st Sess. 73 (1979) (emphasis added). Similarly, the 1979 Statements of Administrative Action, which were explicitly approved by Congress, use permissive, as opposed to mandatory, language:

> In such case, injury may be found if there is material injury, threat of material injury or material retardation of the establishment of an industry to the producers producing all or almost all of the production within the market and if the subsidized or dumped imports are concentrated in such market. (statute) Concentration of subsidized or dumped imports *could be* found to exist if there is a clearly higher ratio of such imports to consumption in such market than the ratio of such imports to consumption in the remainder of the United States market. (practice).

H.R. Doc. No. 153, Part II, 96th Cong., 1st Sess. 388, 432 (1979) (emphasis added).

The legislative history of 19 U.S.C. § 1677(4)(C) was recently analyzed by this Court *in Mitsubishi Materials Corp. v. United States,* 17 CIT ____, Slip-Op. 93–62 (April 27, 1993). In addressing the issue of whether the Commission properly utilized the relative market share test (ratio of import penetration analysis), the Court analyzed the legislative history of the Trade Agreements Act of 1979. *Id.* at 12. While the Court stated that the legislative history of the Act "clearly envisioned utilization of a test of this nature," it did not indicate that such a test was mandated by the statute or legislative history. *Id.*

Plaintiffs state in their brief that the only difference between the House Report and the Senate Report is a minor difference concerning emphasis. Plaintiffs' Brief at 18 n. 5. The Court, however, views the difference as illustrating inconsistent statements concerning the application of the relative market share test. While the language from the Senate Report is arguably mandatory, the language in the House Report and Statements of Administrative Action is clearly permissive. The drafters of 19 U.S.C. § 1677(4)(C) could have resolved the discrepancy

by explicitly mandating within the statute the test the Commission must use. Instead, the statute is silent with respect to mandatory methods of analysis, leaving the Court to conclude that Congress intended for the Commission to exercise its discretion in this fact specific area of analysis.

In the past Congress has indicated its intention for determinations to be made on a case by case basis. For example, while considering amendments to the antidumping act in 1974, the Senate made the following statement with respect to regional industries:

> The Committee agrees with the geographic segmentation principle in antidumping cases. However, the Committee believes that each case may be unique and does not wish to impose inflexible rules as to whether injury to regional producers always constitutes injury to an industry.

S. Rep. No. 1298, 93d Cong., 2d Sess. 181 (1974). This statement demonstrates the fact that Congress did not want to straightjacket the Commission in its method of analyzing cases before it. Furthermore, the Commission has continued to apply the percentage of imports test since 1979. Although Congress has twice amended the antidumping statute, in 1984 and again in 1988, it has on each occasion chosen to leave the import concentration requirement undisturbed.

American Lamb requires a "clearly discernible legislative intent" to overturn agency interpretation. 4 Fed. Cir. (T) at 54, 785, F.2d at 1001. Based on the inconsistency in legislative intent, Congressional recognition of the need for a case by case method of analysis, and the fact that Congress has twice passed up the opportunity to express displeasure with the Commission's practice, this Court holds that the Commission was within its discretion in applying the percentage of imports test.

Prior Commission Practice:

Plaintiffs claim that the Commission's use of the percentage of imports test is inconsistent with prior determinations. The Commission applied the percent of imports analysis in the underlying investigation, and determined that the percentage of imports into the region was insufficient to be considered concentrated. The Commission also determined that the circumstances for application of the ratio of import penetration analysis were not present in light of the facts gathered in the investigation. In the case at hand, subject imports outside the defined region were not widely dispersed throughout the United States, "but [were] found overwhelmingly in the 10-state Mississippi River/ Gulf Coast region that was identified by [intervenors]." AR Doc. 57 at 14. Due to the lack of national dispersion, the Commission used the percentage of imports test and declined to use plaintiffs' ratio of import penetration analysis.

In his oral argument, counsel for plaintiffs cited to *Gray Portland Cement* in support of the position that the Commission must use the ratio

of import penetration test in all regional market cases. In particular, counsel quoted the following passage from the views of then Acting Chairman Brunsdale:

> While Congress *may not have intended* that the Commission consider only the regional concentration of imports relative to regional consumption, the legislative history cited by petitioner suggests that Congress *may have intended* that the Commission would take such a measure into account.

Gray Portland Cement and Cement Clinker from Japan, USITC Pub. 2297, Inv. No. 731–TA–461 (Preliminary) at 15 (1990) (footnote omitted) (emphasis added); Transcript of Oral Argument at 44 (April 15, 1993). This is hardly the "must" language that counsel held it out to be in oral argument. Although Acting Chairman Brunsdale raises the possibility that the ratio of importation test could be required, she does not reach a conclusion and her comments indicate she viewed use of the test as merely permissive. In fact, her later language shows that she did not make a conclusive determination regarding this issue: "I expect, however, additional argument from the parties as to which analysis is appropriate, so that I may revisit the issue in any final investigation." *Gray Portland Cement,* USITC Pub. 2297 at 16. Thus, she used the ratio of import penetration test in this situation, but did not indicate she felt compelled to use the test, nor did she state the test must be used in all regional determinations.

A recent opinion by this Court lends support to the Commission's position, which is essentially that it has the discretion to apply either the percent of imports test or the relative market share test or both as seems appropriate to it based on the circumstances of each particular case. *Mitsubishi Materials,* Slip-Op. 93–62. The *Mitsubishi* court cited with approval language from the *Crushed Limestone from Mexico* Preliminary Determination. This language noted the Commission's discretion in deciding whether to base its determination on the ratio of import concentration test: "the Commission reiterated that it maintained 'discretion to analyze import concentration' based upon market share." *Mitsubishi Materials,* Slip-Op. 93–62 at 13 (quoting *Crushed Limestone from Mexico,* AR Doc. 57 at 14). This Court holds that the Commission has reasonably interpreted 19 U.S.C. § 1677(4)(C) as giving the Commission discretion in analyzing regional import concentration.

Plaintiffs next argue that even if the Commission applied the appropriate analysis, the negative preliminary determination was still arbitrary and capricious due to the fact regional imports exceeded fifty percent of all U.S. imports from Mexico. Plaintiffs claim prior Commission practice used lower numerical benchmarks which, if applied in this case, would encompass the amount of regional imports in the Southeast Texas region.

Plaintiffs fail to realize that Congress did not want to establish rigid numerical standards. Instead, Congress intended for the ITC to base its determinations on the particular facts of each case. This practice was

cited with approval by this Court in *Cemex, S.A. v. United States,* 16 CIT ____, 790 F. Supp. 290 (1992), *aff'd,* 1993 U.S. App. LEXIS 2518 (Fed. Cir. 1993).

> In short, there is nothing in the statute, case law, or administrative practice to indicate Congressional intent to bind ITC to a precise numerical percentage. Indeed the legislative history in the analogous context of a nationwide investigation indicates that Congress intended determinations to be made on a case-by-case basis.

16 CIT at ____, 790 F. Supp. at 294. Plaintiffs cite this very language at page 33 of their brief, yet insist on arguing that the amount of import concentration in this case must fit within particular percentages found in past determinations.

In their brief, plaintiffs rely on *Certain Steel Wire Nails from the Republic of Korea,* USITC Pub. 1088, Inv. No. 731–TA–26 (Final) (1980). Plaintiffs contend that because this is one of the initial determinations the Commission made after Congress enacted the Trade Agreements Act of 1979, it is evidence of the intent of the statute. As evidence of the intent of the statute, however, this determination includes language that actually refutes plaintiffs' argument: "because cases before the Commission are likely to involve different factual circumstances, a precise mathematical formula will not always be reliable in determining the minimum percentage which constitutes sufficient concentration." *Id.* at 11 (footnote omitted). *See also Mitsubishi Materials,* Slip Op. 93–62 at 11 (quoting with approval the above language from *Steel Wire Nails from Korea).* While the Commission found shipments of 43 percent to be a concentration of the imports at issue in *Steel Wire Nails from Korea,* it made clear that this figure was not a benchmark to be followed in every case. Congress wanted to provide flexibility, not a 43 percent benchmark.

Another case cited by plaintiffs illustrates how widely the amount of imports may vary when the Commission bases its determinations on the unique facts of each particular case. "In determining whether there is the requisite concentration of imports within the region, the Commission has 'found the requisite concentration at levels as low as 68 percent and 43 percent.'" Plaintiffs' Brief at 29 (quoting *Nepheline Syenite from Canada,* USITC Pub. 2415, Inv. No. 731–TA–525 (Prelim.) at 19 (Aug. 1991)). This broad range of concentration levels further demonstrates the flexibility the Commission has had in determining the issue of import concentration. The Commission needs discretion in this area to effectively carry out the requirements of 19 U.S.C. § 1677(4)(C), and Congress intended for the ITC to have such discretion.

Reasonable Indication Standard:

Plaintiffs contend that Census Bureau data on the record demonstrated that the percentage of imports into the region was increasing, contrary to the questionnaire data. Therefore, the Commission should have continued the investigation because imports in the region might have increased sufficiently to be considered concentrated by the time of

a final determination. The Court finds plaintiffs' argument unpersuasive.

The standard applicable to the Commission in conducting preliminary antidumping and countervailing duty investigations is articulated in 19 U.S.C. § 1673b(a) (1988). This provision states, in relevant part:

> [T]he Commission * * * shall make a determination, based upon the best information available to it at the time of the determination, of whether there is a *reasonable indication that* –
>
> (1) an industry in the United States –
>
> (A) is materially injured, or
>
> (B) is threatened with material injury, or
>
> (2) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of the merchandise which is the subject of the investigation by the [Department of Commerce].

(Emphasis added). *American Lamb* upheld the Commission's practice of making negative determinations under the "reasonable indication" standard in preliminary investigations when: "(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation." *American Lamb,* 4 Fed. Cir. (T) at 55, 785 F.2d at 1001 (1986).

Plaintiffs argue that the Commission violated the second requirement of *American Lamb,* that there be "no likelihood * * * that contrary evidence will arise in a final investigation." *Id.* at 55, 785 F.2d at 1001. *American Lamb,* however, points out that "[t]he statute calls for a reasonable indication of injury, not a reasonable indication of need for further inquiry." *Id.* In this case, the Commission based its concentration analysis on a complete record. Based on this complete record, there was no reason for the Commission to believe that contrary evidence would arise in a final investigation. Plaintiffs do not contend that further investigation would produce contrary evidence, but rather that the concentration level is likely to change by the time of the final determination. In fact, plaintiffs never argued before the Commission that the import data were incomplete, incorrect, or were otherwise insufficient to allow the Commission to make a determination concerning concentration.

Plaintiffs argue the Commission ignored evidence on the record which indicated that defendant-intervenors attempted "to obscure the volume of imports being brought into the Southeast Texas region in order to decrease the import concentration ratio." Plaintiffs' Brief at 43. Plaintiffs claim evidence on the record shows defendant-intervenors knew that an antidumping duty investigation would likely be instituted before the petition was actually filed. *Id.* (citing AR Doc. 44 (Petitioners' Post-Conference Brief) at 23, Collective Exhibit 15 (Vulcan Letter of 5/26/92 at 2)).

This argument amounts to pure conjecture. There is no evidence indicating the defendant-intervenors knew when a petition would be filed; only plaintiffs knew what their own schedule was for filing their petition. Even if the defendant-intervenors surmised that a petition would be filed, they would not have known that the investigation would be based on a regional industry analysis or what the regional boundaries would be. Plaintiffs base this contention of artificially depressed imports on Census Bureau data which indicated import concentration in the Southeast Texas region was 74.7 percent in the first two months of 1992, compared with 54.3 percent for the first three months of 1992. AR Doc. 1 (Petition) at 48 (Table 23). The Census Bureau data was on the record as was the Commission's questionnaire data. The Commission is entitled to resolve conflicts in the evidence at the preliminary stage under *American Lamb* and, in this case, relied on the questionnaire data as being more reliable.

The Commission must be allowed to weed out those cases that are lacking in merit. It could not successfully accomplish this task if it were forced to proceed to a final determination "whenever it finds a mere 'possibility' of injury in the petition and accompanying information." *American Lamb*, 4 Fed. Cir. (T) at 56, 785 F.2d at 1002. Plaintiffs are not left without remedy. If in fact concentration did change to an appropriate level, then plaintiffs could file a new case.

Material Injury:

Plaintiffs contend the Commission erred by basing its negative preliminary determination only on evidence of lack of concentration. According to plaintiffs, the Commission should have also examined factors relevant to injury and causation.

The Commission majority did not reach the issue of material injury in this case.[2] As discussed above, 19 U.S.C. § 1677(4)(C) sets up three prerequisites which must be satisfied before the Commission can reach an affirmative determination under a regional industry analysis. In this case the Commission determined that the first criteria, that there be a regional market meeting the requirements of the statute, was satisfied. The second criteria, that there be a concentration of dumped imports into the regional market, was not satisfied. Therefore, the Commission could not proceed to the third criteria, that there be material injury or threat thereof to producers of all or almost all of the regional production, or material retardation to the establishment of an industry due to the subsidized or dumped imports. Because the Commission did not consider material injury, there was no need to examine evidence relevant only to that issue.

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[2] The concurring commissioners did reach the material injury issue. However, they dealt with the issue in a conclusory fashion, stating that due to a lack of concentration, they were "compelled to conclude" there was no material injury or threat of material injury. AR Doc. 57 at 23.

CONCLUSION

After considering all of plaintiffs' arguments, the Court holds that the Commission's negative preliminary determination was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Therefore, the Court denies plaintiffs' motion and sustains the International Trade Commission's negative preliminary determination in *Crushed Limestone from Mexico,* 57 Fed. Reg. 31,386 (1992). This action is dismissed.

(Slip Op. 93–82)

FEDERAL-MOGUL CORP., PLAINTIFF AND PLAINTIFF-INTERVENOR, AND TORRINGTON CO., PLAINTIFF AND PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., NTN CORP., KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., PEER BEARING CO., NSK LTD., NSK CORP., CATERPILLAR INC., MINEBEA CO., LTD., AND NMB CORP., DEFENDANT-INTERVENORS

Consolidated Court No. 91–07–00530

Plaintiff, Federal-Mogul Corporation ("Federal-Mogul"), moves pursuant to Rule 56.1 of the Rules of this Court for partial judgment on the administrative record alleging that five clerical errors exist in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Final Results of Antidumping Duty Administrative Reviews,* 56 Fed. Reg. 31,754 (1991).

Held: Plaintiff and defendant agree that this case should be remanded to the Department of Commerce, International Trade Administration, for the correction of three clerical errors.

[Plaintiff's motion for partial judgment on the agency record granted in part; case remanded.]

(Dated May 25, 1993)

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, J. Eric Nissley, Joseph A. Perna, V and *Larry Hampel)* for plaintiff and plaintiff-intervenor Federal-Mogul Corporation.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Wesley K. Caine, Christopher J. Callahan, John M. Breen, Geert De Prest, Margaret E.O. Edozien, Lane S. Hurewitz, Patrick J. McDonough, Robert A. Weaver and *Amy S. Dwyer)* for plaintiff and plaintiff-intervenor The Torrington Company.

Stuart E. Schiffer, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis* and *Jane E. Meehan);* of counsel: *John D. McInerney,* Acting Deputy Chief Counsel for Import Administration, *Dean A. Pinkert, Stephen J. Claeys* and *Craig R. Giesze,* Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Powell, Goldstein, Frazer & Murphy (Peter O. Suchman, Neil R. Ellis, Susan E. Silver, T. George Davis and *Niall P. Meagher)* for defendant-intervenors Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.

Barnes, Richardson & Colburn (Robert E. Burke, Donald J. Unger, Kazumune V. Kano and *Diane A. MacDonald)* for defendant-intervenors NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Corporation.

Coudert Brothers (Robert A. Lipstein, Matthew P. Jaffe and *Nathan V. Holt)* for defendant-intervenors NSK Ltd. and NSK Corporation.

Venable, Baetjer, Howard & Civiletti (John M. Gurley, John C. Dibble and *Lindsay B. Meyer)* for defendant-intervenor Peer Bearing Company.

Powell, Goldstein, Frazer & Murphy (Richard M. Belanger, Neil R. Ellis and *D. Christine Wood)* for defendant-intervenor Caterpillar Inc.

Tanaka Ritger & Middleton (H. William Tanaka, Michele N. Tanaka and *Michael J. Brown)* for defendant-intervenors Minebea Co., Ltd. and NMB Corporation.

OPINION

TSOUCALAS, *Judge:* Plaintiff, Federal-Mogul Corporation ("Federal-Mogul"), commenced this action to challenge certain aspects of the Department of Commerce, International Trade Administration's ("ITA") final results in the first administrative review of imports of antifriction bearings from Japan. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan: Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 56 Fed. Reg. 31,754 (1991).

On June 11, 1990, the ITA initiated an administrative review of imports of ball bearings, cylindrical roller bearings, spherical plain bearings and parts thereof from Japan. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom Initiation of Antidumping Administrative Reviews,* 55 Fed. Reg. 23,575 (1990).

On March 15, 1991, the ITA published its preliminary determination in the administrative review. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts thereof from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Antidumping Duty Administrative Reviews,* 56 Fed. Reg. 11,186 (1991).

On July 11, 1991, the ITA published its Final Results in this proceeding. *Final Results,* 56 Fed. Reg. 31,754.

Federal-Mogul alleges that five clerical errors exist in the ITA's Final Results. *Memorandum in Support of Federal-Mogul Corporation's First Motion for Partial Judgment on the Agency Record* at 2–12. Defendant has admitted that three of these errors are valid and requests this Court to remand this case at the proper time for the correction of these three errors. *Defendant's Memorandum in Partial Opposition to Federal-Mogul Corporation's First Motion for Partial Judgment on the Agency Record* at 2–9.

Federal-Mogul now agrees with defendant that remand is for only the following three errors: (1) a double-deduction of pre-sale freight in the calculation of Nachi-Fujikoshi Corporation's ("Nachi") foreign market

value, (2) mistreatment of Nachi's research and development expenses as selling expenses for purposes of adjusting constructed value, and (3) the failure to remove all selling expenses from Izumoto Seiko Co., Ltd.'s exporter's sales price. *Federal-Mogul Corporation's Reply to Defendant's Partial Opposition to Federal-Mogul Corporation's First Motion for Partial Judgment on the Agency Record* at 1–2.

This Court has often remanded cases to the ITA to correct inadvertent computer programming and ministerial errors such as those in this case. *See Daewoo Elecs. Co. v. United States*, 15 CIT ___, ___, 760 F. Supp. 200, 208 (1991); *Serampore Indus. Pvt. Ltd. v. United States*, 12 CIT 825, 834, 696 F. Supp. 665, 673 (1988). Therefore, this Court remands this case to the ITA to correct these three errors. The results of this remand will be due at the same time as the results of the remand filed pursuant to *Federal-Mogul Corp. v. United States*, 17 CIT ___, Slip Op. 93–17 (February 4, 1993).

(Slip Op. 93–83)

FEDERAL-MOGUL CORP., PLAINTIFF AND PLAINTIFF-INTERVENOR, AND TORRINGTON CO., PLAINTIFF AND PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., NTN CORP., KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., PEER BEARING CO., NSK LTD., NSK CORP., CATERPILLAR INC., MINEBEA CO., LTD. AND NMB CORP., DEFENDANT-INTERVENORS

Consolidated Court No. 91–07–00530

Plaintiff, Federal-Mogul Corporation ("Federal-Mogul"), challenges the Department of Commerce, International Trade Administration's ("ITA") use of the "all others" rate calculated during this administrative review as the cash deposit rate for companies subject to the "all others" cash deposit rate from the less-than-fair-value investigation which were not examined during this review.

Held: This Court finds that the ITA's use of the "all others" rate calculated during this administrative review for companies subject to the "all others" cash deposit rate from the less-than-fair-value investigation which were not examined during this review was not in accordance with law.

[Plaintiff's motion for judgment on the agency record granted; case remanded.]

(Dated May 25, 1993)

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Barnes, Richardson & Colburn (Robert E. Burke, Donald J. Unger, Kazumune V. Kano and *Diane A. MacDonald)* for defendant-intervenors NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Corporation.

Coudert Brothers (Robert A. Lipstein, Matthew P. Jaffe and *Nathan V. Holt)* for defendant-intervenors NSK Ltd. and NSK Corporation.

Venable, Baetjer, Howard & Civiletti (John M. Gurley, John C. Dibble and *Lindsay B. Meyer)* for defendant-intervenor Peer Bearing Company.

Powell, Goldstein Frazer & Murphy (Richard M. Belanger, Neil R. Ellis and *D. Christine Wood)* for defendant-intervenor Caterpillar Inc.

Tanaka Ritger & Middleton (H. William Tanaka, Michele N. Tanaka and *Michael J. Brown)* for defendant-intervenors Minebea Co., Ltd. and NMB Corporation.

OPINION

TSOUCALAS, *Judge:* Plaintiff, Federal-Mogul Corporation ("Federal-Mogul"), commenced this action to challenge certain aspects of the Department of Commerce, International Trade Administration's ("ITA") final results in the first administrative review of imports of antifriction bearings ("AFBs") from Japan. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Final Results of Antidumping Duty Administrative Reviews ("Final Results")*, 56 Fed. Reg. 31,754 (1991). Substantive issues raised by the parties in the underlying administrative proceeding were addressed by the ITA in the issues appendix to *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review ("Issues Appendix")*, 56 Fed. Reg. 31,692 (1991).

Federal-Mogul has now filed its second motion for partial judgment on the agency record alleging that the ITA's use of the "all others" rate calculated during this administrative review for companies subject to the "all others" cash deposit rate from the less-than-fair-value ("LTFV") investigation which were not examined during this review was not in accordance with law. *Federal-Mogul Corporation's Second Motion for Partial Judgment on the Agency Record.*

BACKGROUND

On June 11, 1990, the ITA initiated an administrative review of imports of ball bearings, cylindrical roller bearings, spherical plain bearings and parts thereof from Japan. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom Initiation of Antidumping Administrative Reviews,* 55 Fed. Reg. 23,575 (1990).

On March 15, 1991, the ITA published its preliminary determination in the administrative review. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts thereof from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Antidumping Duty Administrative Reviews,* 56 Fed. Reg. 11,186 (1991).

On July 11, 1991, the ITA published its Final Results in this proceeding. *Final Results,* 56 Fed. Reg. 31,754.

DISCUSSION

The Court's jurisdiction over this matter is derived from 19 U.S.C. § 1516a(a)(2) (1988) and 28 U.S.C. § 1581(c) (1988).

A final determination by the ITA in an administrative proceeding will be sustained unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States,* 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988).

"All Others" Rate:

In this administrative review, for companies which were not investigated in the LTFV investigation and therefore received the LTFV "all others" cash deposit rate and were also not investigated during this administrative review, the ITA used the new "all others" rate calculated in this administrative review as the new cash deposit rate for those companies. *Final Results,* 56 Fed. Reg. at 31,756–57.

In the *Final Results* the ITA stated:

> The following deposit requirements will be effective for all shipments of Japanese-origin antifriction bearings (other than tapered roller bearings) and parts thereof, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of these administrative reviews, as provided by section 751(a)(1) of the Act:
>
> * * * * * * *
>
> (4) The cash deposit rate for all other manufacturers which export the subject merchandise shall be the "All Others" rate listed in the section "Final Results of Review" above for each class or kind of merchandise [23.88% for ball bearings, 51.82% for cylindrical roller bearings and 3.08% for spherical plain bearings].

56 Fed. Reg. at 31,756–57.

Federal-Mogul argues that the ITA's use of the "all others" rate calculated during this administrative review as a new cash deposit rate for companies previously subject to the LTFV "all others" rate and not reviewed during this administrative review is not in accordance with 19

U.S.C. § 1675(a)(2) (1988) and 19 C.F.R. § 353.22(e)(1) (1991).[1] *Memorandum in Support of Federal-Mogul Corporation's Second Motion for Partial Judgment on the Agency Record ("Federal-Mogul's Memorandum")* at 3–12.

Specifically, Federal-Mogul argues that the statute and the regulation require that when a company subject to an antidumping duty cash deposit rate is not reviewed during an administrative review, the rate at which that company has made cash deposits automatically becomes that company's assessment rate for the period covered by that administrative review and its entries made during that period of review are liquidated at that rate. *See* 19 U.S.C. § 1675(a)(2); 19 C.F.R. § 353.22(e).

Federal-Mogul further argues that 19 U.S.C. § 1675(a)(2) requires that a company's assessment rate calculated during an administrative review "shall be the basis * * * for deposits of estimated duties" and that 19 C.F.R. § 353.22(e)(2) requires that the ITA instruct the Customs Service to collect cash deposits based on the assessment rate calculated during the administrative review for each unreviewed company. *Federal-Mogul's Brief* at 5–6; *Federal-Mogul Corporation's Reply to the Government's Opposition to Federal-Mogul Corporation's Second Motion for Partial Judgment on the Agency Record ("Federal-Mogul's Reply")* at 5–7. Therefore, Federal-Mogul argues that the LTFV "all others" cash deposit rate becomes the assessment rate calculated during an administrative review for the unreviewed companies subject to that rate, and that rate in turn remains the cash deposit rate for those companies for that administrative review. *Federal-Mogul's Brief* at 5–6; *Federal-Mogul's Reply* at 5–7.

Federal-Mogul points out that the ITA's own explanation of 19 C.F.R. § 353.22(e)(2) states:

> Because the cash deposit (or bond) rate is the basis for each interested party's decision whether to exercise its right to request a review, it would make no sense to change the rate after the time for request has expired. * * * *In any event, the failure of an interested party to file a timely request for review constitutes a determination under section 751 of the dumping margin for the entries made during the review period.*

Antidumping Duties; Final Rule, 54 Fed. Reg. 12,742, 12,756 (1989) (emphasis added); *Federal-Mogul's Memorandum* at 6; *Federal Mogul's Reply* at 5–6.

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[1] 19 U.S.C. § 1675(a)(2) states in pertinent part that the ITA's determination of antidumping duties made during an administrative review "shall be the basis * * * for deposits of estimated duties."
19 C.F.R. § 353.22(e) states:

> (e) *Automatic assessment of duty.* (1) For orders, if the Secretary does not receive a timely request [for review], the Secretary, without additional notice, will instruct the Customs Service to assess antidumping duties on the merchandise described in paragraph (b) of this section at rates equal to the cash deposit of, or bond for, estimated antidumping duties required on that merchandise at the time of entry, or withdrawal from warehouse, for consumption *and to continue to collect the cash deposits previously ordered.*
> (2) If the Secretary receives a timely request [for review], the Secretary in accordance with paragraph (e)(1) of this section will instruct the Customs Service to assess antidumping duties, *and to continue to collect the cash deposits on the merchandise not covered by the request.*

(Emphasis added).

In addition, Federal-Mogul argues that the ITA's use of the new "all others" rate runs counter to the reasons articulated by Congress when it amended the antidumping duty statute in 1984 to make administrative reviews conditional upon a request by an interested party. *See* H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess. 181 (1984). Federal-Mogul argues that changing a company's cash deposit rate without reviewing that company's actual entries will force domestic interested parties to request reviews of all parties subject to an antidumping duty order to prevent them from receiving a potentially incorrect and lower cash deposit rate. Federal-Mogul argues that this will vastly increase the number and complexity of administrative reviews the ITA is required to perform, thereby defeating the purpose of the 1984 amendments. *Federal-Mogul's Memorandum* at 7–8.

Federal-Mogul argues that this Court should not follow *Floral Trade Council v. United States*, 16 CIT ____, 799 F. Supp. 116 (1992), which upheld the ITA's use of the new "all others" rate as the cash deposit rate for unreviewed companies. Federal-Mogul argues that the court in *Floral Trade Council* was "concerned that all relevant arguments may not have been made on this issue" and was "unprepared to conclude as a general proposition that the ITA's new approach is consistent with its regulation." 16 CIT at ____ n.2, 799 F. Supp. at 119 n.2. Federal-Mogul argues that the court in *Floral Trade Council* decided the case solely on its specific facts. *Federal-Mogul's Memorandum* at 9–10 n.6.

Federal-Mogul also argues that the ITA has departed from its longstanding administrative practice without providing an explanation for its departure. *Federal-Mogul's Memorandum* at 8–11. Federal-Mogul points out that while the ITA states that it implemented its new practice in *Notice of Final Results of Antidumping Duty Administrative Review: Certain Fresh Cut Flowers From Mexico ("Flowers")*, 56 Fed. Reg. 29,621, 29,623 (1991), the ITA continued to use the pre-existing cash deposit rate for unreviewed companies in *Color Television Receivers Except for Video Monitors, From Taiwan; Final Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 31,378, 31,387 (1991), which was published after *Flowers* and the day before the Final Results challenged here. *Federal-Mogul's Memorandum* at 10 n.6.

Finally, Federal-Mogul argues that issues which deal with cash deposit rates set during an administrative review do not become moot upon the publication of the final results of the next administrative review which sets new cash deposit rates. Federal-Mogul argues that precisely because cash deposit rates are superseded in subsequent reviews, almost always before judicial review can occur, cash deposit rate issues are not moot because they fall within the exception to the mootness doctrine for issues "capable of repetition, yet evading review." *Federal-Mogul's Memorandum* at 4 n.4 (*citing DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974); *Roe v. Wade*, 410 U.S. 113, 125 (1973); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911); *Torrington Co. v. United*

States, 16 CIT ___, ___, 802 F. Supp. 453, 454 (1992)); *Federal-Mogul's Reply* at 4.

In addition, Federal-Mogul argues that this issue is not moot because if this Court agrees that the ITA's use of the new "all others" rate for unreviewed companies subject to the "all others" cash deposit rate from the LTFV investigation is not in accordance with law, then the ITA will be required to reinstate the LTFV cash deposit rate for any company which has not been subject to an administrative review of its entries. Each entry made pursuant to the incorrect cash deposit rate which is awaiting liquidation has benefited and continues to benefit from the ITA's unlawful action. *Federal-Mogul's Reply* at 2.

Also, entries of AFBs made between May 1, 1992 and June 23, 1992 are still subject to the incorrect cash deposit rate set during the first administrative review at issue here and will not be assessed for liquidation at the earliest until the ITA initiates the fourth administrative review which is anticipated sometime in May or June 1993. Therefore, entries subject to the incorrect "all others" cash deposit rate continue to exist unliquidated and are potentially subject to assessment at an incorrect rate and, therefore, this issue is not moot. *Id.* at 3–4; *see Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews*, 57 Fed. Reg. 28,360 (1992); *Antifriction Bearings Other Than Tapered Roller Bearings) and Parts Thereof; Initiation of Antidumping Administrative Reviews and Request for Revocation of Order (in Part)*, 57 Fed. Reg. 29,700 (1992).

Defendant argues that this Court should refuse to reach the issue of the ITA's use of the new "all others" rate as the cash deposit rate for companies which were not subject to review because publication of the new cash deposit rates in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews*, 57 Fed. Reg. 28,360, has made this issue moot. *Defendant's Memorandum in Opposition to Plaintiff's Second Motion for Partial Judgment Upon the Agency Record ("Defendant's Memorandum")* at 6–11.

Defendant argues that, if the Court chooses to address the merits of Federal-Mogul's claim, 19 U.S.C. § 1675(a) says nothing about how the ITA is to calculate cash deposit rates for unreviewed companies. *Defendant's Memorandum* at 13–14, 19–20.

Defendant argues that 19 U.S.C. § 1675(a)(2) does not apply to entries which are not covered by a request for administrative review. *Id.* at 13.

Defendant admits that 19 C.F.R. § 353.22(e) does provide for the automatic assessment of antidumping duties for unreviewed companies at their cash deposit rate but, argues that it applies only to entries of companies which are subject to a specific cash deposit rate and not to entries subject to the "all others" rate. Defendant states that the ITA has a separate administrative practice governing such entries. Defendant argues that since 19 C.F.R. § 353.22(e) does not apply to entries covered by the

"all others" rate, the ITA is free to alter its administrative practice in regard to those entries. Defendant argues that this administrative practice is an interpretive rule which is not subject to the notice and comment provisions of the Administrative Procedures Act. *Defendant's Memorandum* at 14–17. However, defendant points out that the ITA has explained its change of practice on this issue in numerous proceedings. *Id.* at 22–23.

In support of its position, defendant relies on *Floral Trade Council,* 16 CIT at ____, 799 F. Supp. at 119, where the court raised, *sua sponte,* the issue of whether 19 C.F.R. § 353.22(e)(2) prohibits the ITA from using the new "all others" rate for old participants not covered by the current administrative review. Defendant argues that the court in *Floral Trade Council* concluded that the ITA's interpretation of the regulation allowing the use of the new "all others" rate for unreviewed companies was not unreasonable. 16 CIT at ____, 799 F. Supp. at 119. *Defendant's Memorandum* at 11–13.

Defendant alleges that its change in administrative practice was explained and justified in *Flowers,* 56 Fed. Reg. at 29,623, which was affirmed in *Floral Trade Council,* 16 CIT ____, 799 F. Supp. 116. The court in *Floral Trade Council* stated that the:

> ITA arrived at its new approach through a series of choices. First, it decided that use of two general rates, one for past shippers and one for new shippers, presented administrative difficulties for Customs in carrying out the antidumping order. 56 Fed. Reg. at 29,623. Next it decided to use its previous new shipper methodology for past participants. Although this approach may present problems of fairness in a variety of circumstances, the issue before the court is whether this methodology is acceptable as applied in this case.

16 CIT at ____, 799 F. Supp. at 118 (citations omitted); *Defendant's Memorandum* at 12–13; 22–23.

Finally, defendant argues that Federal-Mogul seeks inappropriate relief. Defendant argues that this Court's jurisdiction over this matter relates only to entries covered by the first administrative review pursuant to 28 U.S.C. § 2640(b) (1988) and 19 U.S.C. § 1516a(b)(1)–(2) (1988). Defendant argues that this Court does not have jurisdiction to order the ITA not to use its new "all others" methodology in future reviews. *Defendant's Memorandum* at 23–25. Defendant asserts that Federal-Mogul is really asking this Court for a writ of mandamus and that Federal-Mogul has not satisfied the requirements for such extraordinary relief. *Id.* at 25–28.

This Court finds that this issue is not moot because the ITA's use of the new "all others" rate for unreviewed companies covers entries made between May 1, 1992 and June 23, 1992, which are not yet subject to an administrative review and have not yet been liquidated. Therefore, these entries are still subject to the Final Results at issue here and are within this Court's jurisdiction. 28 U.S.C. § 1581(c).

Also, this Court finds that this issue is not moot because it is an issue which is "capable of repetition, yet evading review." *DeFunis*, 416 U.S. at 319; *Roe v. Wade*, 410 U.S. at 125; *Southern Pacific Terminal*, 219 U.S. at 515; *NSK Ltd. v. United States*, 17 CIT ____, Slip Op. 93–50 (April 2, 1993).

As to the merits of this issue, this Court finds that the statutory framework for administrative reviews clearly anticipates that in cases where a company makes cash deposits on entries of merchandise subject to antidumping duties, and no administrative review of those entries is requested, the cash deposit rate automatically becomes that company's assessment rate for those entries. 19 U.S.C. § 1675(a)(2); 19 C.F.R. § 353.22(e). Defendant has admitted this. *Defendant's Memorandum* at 17. This also was clearly the ITA's interpretation of the statute when it promulgated its current regulations. *Antidumping Duties; Final Rule*, 54 Fed. Reg. at 12,756.

This Court also finds that 19 U.S.C. § 1675(a)(2)'s requirement that the ITA's determination of a company's antidumping duty assessment rate during an administrative review "shall be the basis * * * for deposits of estimated duties" requires the ITA to use the assessment rate determined in an administrative review as the new cash deposit rate for that company. In a situation where a company's entries are unreviewed, the prior cash deposit rate from the LTFV investigation becomes the assessment rate, which must in turn become the new cash deposit rate for that company. *See* 19 U.S.C. § 1675(a)(2).

In addition, Congress amended 19 U.S.C. § 1675(a) to require administrative reviews of entries of merchandise subject to an outstanding antidumping duty order only upon request by an interested party. Trade and Tariff Act of 1984, Pub. L. No. 98573, Title VI, § 611(a)(2), 98 Stat. 3031 (1984). In adopting this amendment, Congress stated that the amendment "is designed to limit the number of reviews in cases in which there is little or no interest, thus limiting the burden on petitioners and respondents, as well as the administering authority." H. R. Conf. Rep. No. 1156 at 181.

In making a decision whether or not to request an administrative review of certain entries, the parties rely on the cash deposit rate then in force for those entries. If the ITA is allowed to arbitrarily change this cash deposit rate for unreviewed firms, which are presumably unreviewed because the parties are happy with assessments and future cash deposits being made at that cash deposit rate, in many cases the parties will be required to request administrative reviews of all entries of the subject merchandise. Importers and foreign producers will make the request 50 their future entries will not be subject to a potentially higher "all others" cash deposit rate. Likewise, the domestic industry will request reviews to ensure that future entries will not be subject to a potentially lower "all others" cash deposit rate. This will have the effect of increasing the number and complexity of administrative reviews thereby defeating the express purpose of the 1984 amendment.

Finally, the court in *Floral Trade Council* made it clear that it was willing to sanction the use of the ITA's new "all others" rate methodology based solely on the specific facts presented and the arguments made before the court in that case. As the court stated:

> the issue before the court is whether this methodology is acceptable as applied in this case.
>
> * * * * * * *
>
> Because importing interests did not intervene in this case, the court is unprepared to conclude as a general proposition that ITA's new approach is consistent with its regulation. The court is concerned that all relevant arguments may not have been made on this issue, as well as with regard to several of the subsidiary points of procedure for calculating the unified "all other" rate.

Floral Trade Council, 16 CIT at ____, ____ n.2; 799 F. Supp. at 118, 119 n.2. Therefore, this Court declines to follow *Floral Trade Council* because it was limited to the facts of that case.

This Court finds that the ITA's use of the new "all others" rate calculated during this administrative review as the cash deposit rate for unreviewed companies which received the "all others" rate during the LTFV investigation is not in accordance with law. This case is remanded to the ITA to allow the ITA to reinstate the "all others" cash deposit rate from the LTFV investigation for entries made between May 1, 1992 and June 23, 1992, which have as yet not become subject to assessment pursuant to a subsequent administrative review. The ITA will file the results of this remand with this Court on June 28, 1993 along with the results of remand filed pursuant to *Federal-Mogul Corp. v. United States,* 17 CIT ____, Slip Op. 93–17 (Feb. 4, 1993).

(Slip Op. 93–84)

KRUPP STAHL A.G. AND KRUPP STEEL PRODUCTS, INC., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS, AND ALLEGHENY LUDLUM STEEL CORP., ET AL., DEFENDANT-INTERVENORS

Court No. 87–02–00199

[*Held:* Commerce's final results of the administrative review are affirmed.]

(Decided May 26, 1993)

Coudert Brothers (Milo G. Coerper, Robert A. Lipstein, Matthew P. Jaffe) for plaintiffs.

Stuart E. Schiffer, Acting Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(Velta A. Melnbrencis), Robert E. Nielsen,* of counsel, for defendants.

Collier, Shannon, Rill & Scott (Paul C. Rosenthal, Robin H. Gilbert) for defendant-intervenors.

DiCarlo, *Chief Judge:* Plaintiffs, Krupp Stahl A.G. and its subsidiary (Krupp), challenge the final determination by the International Trade Administration, Department of Commerce (ITA or Commerce), of the first administrative review of the antidumping duty order regarding certain stainless steel sheet from the Federal Republic of Germany. The issue before the court is whether Commerce properly used the preliminary dumping margin from the less-than-fair-value (LTFV) investigation, which was based on petition information and superseded by the final margin in the LTFV investigation, as best information available (BIA) for the first administrative review period. The court has jurisdiction under 19 U.S.C. § 1516a(a)(2) (1988) and 28 U.S.C. § 1581(c) (1988). Under the special circumstances of the case, the court holds that Commerce's choice of BIA is proper.

Background

The history of this case goes back to Commerce's antidumping investigation of cold-rolled stainless steel sheet and strip products from Germany in 1982. The investigation was conducted with respect to Krupp and two other German manufacturers. Commerce's preliminary determination of the investigation established an estimated dumping margin for Krupp's products at 27% *ad valorem*. *Certain Stainless Steel Sheet and Strip Products From the Federal Republic of Germany,* 47 Fed. Reg. 56,529 (Dep't Comm. 1982). The 27% margin was based on the simple average margins contained in the petition, as a result of Commerce's decision to resort to the BIA in the preliminary determination. *Id.* at 56,530.

Commerce subsequently verified Krupp's response and published a final determination of LTFV sales, establishing a final dumping margin of 7.76% *ad valorem* for Krupp. *Certain Stainless Steel Sheet and Strip Products From the Federal Republic of Germany,* 48 Fed. Reg. 20,459 (Dep't Comm. 1983). An antidumping duty order was issued accordingly following the final affirmative injury determination of the International Trade Commission. *Certain Stainless Steel Sheet and Strip Products From the Federal Republic of Germany,* 48 Fed. Reg. 28,680 (Dep't Comm. 1983).

In July 1983, Commerce commenced the first administrative review for the period of December 17, 1982 through May 31, 1983. Krupp submitted responses to Commerce's questionnaire and other requests for additional information. The administrative review, however, was terminated upon Krupp's withdrawal of its request for the continuation of the review following the voluntary restraint agreement between the United States and the European Community in July 1986. Pursuant to the regulations implementing the Trade and Tariff Act of 1984, which provide automatic assessment of entries at rates equal to the cash deposit of or bond for estimated antidumping duties required on the merchandise at the time of entry if no review is requested, *Antidumping and Countervailing Duty; Administrative Reviews on Request; Transition Provisions,* 50 Fed. Reg. 32,556 (Dep't Comm. 1985), Commerce instructed

the Customs Service to liquidate Krupp's entries of the first review period at the deposit rate of 27%, and of the succeeding period at the rate of 7.76%.

Krupp filed this action in 1987, contesting the 27% assessment rate and seeking a rate of 7.76% for the first review period. Alternatively, Krupp requested the court to remand the proceeding to Commerce with instructions to perform an administrative review of the entries at issue. In April 1991, the court remanded the proceeding with instructions for Commerce to conduct an administrative review for the first review period, holding that the 1984 Trade and Tariff Act does not retroactively affect investigations initiated before the effective date of the Act and that Commerce had obligations to conduct that review without Krupp's request. *Krupp Stahl A.G. v. United States,* 15 CIT ____, Slip Op. 91–31 (April 19, 1991).

Pursuant to the court decision, Commerce reinstated the review for the first review period and issued a new questionnaire to Krupp. In July 1991, Krupp informed Commerce that since German law does not require retention of business records for more than five years, its business records relevant to the review period were destroyed during 1989; as a result, it was unable to respond to the new questionnaire. Thus, Krupp conceded, Commerce would not be able to conduct the review in the manner contemplated by the court, and would be forced to use the best information available. Krupp claimed, however, that Commerce should use 7.76%, the final rate determined in the LTFV investigation, as the BIA rate for the first review period.

In November 1991, Commerce published the preliminary results of the administrative review, finding 27% as the assessment rate for the review period. *Cold-Rolled Stainless Steel Sheet From Germany,* 56 Fed. Reg. 56,976 (Dep't Comm. 1991). The preliminary results stated that, because Krupp had failed to respond to the new questionnaire and destroyed the records needed to verify the adequacy of the information contained in the earlier response, Commerce used the BIA in the review, and that the BIA rate is 27% which was the rate provided in the petition as well as the rate assigned to Krupp in the preliminary determination. *Id.* at 56,977.

Commerce completed its review on May 21, 1992 and the final results of the review confirmed the BIA rate of 27% for the review period. *Cold-Rolled Stainless Steel Sheet from Germany,* Pub. R. 837 (Final Results). Commerce decided not to publish the final results until it receives permission from the court.

Discussion

This court shall sustain a final determination of Commerce in an administrative proceeding unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988).

Krupp asserts that Commerce's use of the petition-based preliminary LTFV rate as BIA in the administrative review is not supported by sub-

stantial evidence on the record and is not in accordance with law based on the following allegations: (1) the use of petition information as BIA in an administrative review is prohibited by the statute; (2) the use of petition information as BIA is unsupported by substantial evidence on the record because the petition itself is not included in the record for this administrative review; (3) the use of the petition-based preliminary LTFV margin as BIA in an administrative review is an unprecedented departure from Commerce's practice; and (4) the preliminary LTFV margin cannot be used to assess antidumping duties where it differs from the final LTFV margin.

1. *Commerce's Selection of Best Information Available:*

Commerce is authorized by statute to use best information available to it as the basis for its action if it "is unable to verify the accuracy of the information submitted," 19 U.S.C. § 1677e(b) (1988), or if a party "refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation." *Id.* § 1677e(c). Because of its destruction of the records, Krupp does not dispute Commerce's resort to BIA in this administrative review. What Krupp challenges is Commerce's selection of the BIA.

The BIA statute does not define what is the "best information available" to the agency. Commerce's implementing regulations provide:

> *What is best information available.* The best information available may include the factual information submitted in support of the petition or subsequently submitted by interested parties * * *. If an interested party refuses to provide factual information requested by the Secretary or otherwise impedes the proceeding, the Secretary may take that into account in determining what is the best information available.

19 C.F.R. § 353.37(b) (1992).

Under the current statutory scheme, Commerce has broad discretion in determining what constitutes the BIA in a given situation. "Once Commerce has exercised its discretion to use the best information available rule against a respondent, it is for Commerce, not the respondent, to determine what is the best information." *Rhone Poulenc, Inc. v. United States,* 13 CIT 218, 224, 710 F. Supp. 341, 346 (1989), *aff'd,* 8 Fed. Cir. (T) ____, 899 F.2d 1185 (1990) (citation omitted). "The information the ITA may use as best information includes 'all information that is accessible or may be obtained, whatever its source.'" *N.A.R., S.p.A., v. United States,* 14 CIT 409, 416, 741 F. Supp. 936, 942 (1990) (quoting *Timken Co. v. United States,* 11 CIT 786, 788, 673 F. Supp. 495, 500 (1987)). The best information "is not necessarily accurate information, it is information which becomes usable because a respondent has failed to provide accurate information." *Asociacion Colombiana de Exportadores de Flores v. United States,* 13 CIT 13, 28, 704 F. Supp. 1114, 1126 (1989), *aff'd,* 8 Fed. Cir. (T) ____, 901 F.2d 1089, *cert. denied sub nom. Floramerica, S.A. v. United States,* 498 U.S. 848 (1990). And the ITA is not required to equate "best information" with "most recent in-

formation" for computing the dumping margin. *Rhone Poulenc, Inc. v. United States,* 899 F.2d at 1190.

More importantly, in *Rhone Poulenc,* the leading case on Commerce's selection of BIA, the Court of Appeals sanctioned ITA's use of BIA as an effective means to induce respondent's cooperation in the administrative review. Although the Court of Appeals did not decide whether the ITA may use BIA to "penalize" a party, it affirmed that the ITA may use BIA "as 'an investigative tool, which that agency may wield as an informal club over recalcitrant parties or persons whose failure to cooperate may work against their best interest.'" *Id.* at 1191 (quoting *Atlantic Sugar Ltd. v. United States,* 2 Fed. Cir. (T) 130, 134, 744 F.2d 1556, 1560 (1984)). Following *Rhone Poulenc,* the Court of International Trade also sanctioned ITA's practice of taking into account the level of the respondents' cooperation in its use of BIA. *See Allied-Signal Aerospace Co. v. United States,* 16 CIT ____, 802 F. Supp. 463 (1992) (upholding ITA's two-tier use of BIA, under which the ITA imposes the most adverse rates upon those refusing to cooperate or otherwise significantly impeding the proceedings and less adverse rates upon those who are substantially cooperative but failed to provide requested information in a timely manner or in the form required).

It is not controverted in this case that Krupp destroyed its business records pertaining to the review period. Krupp claims that the records were destroyed because German law does not require retention of the records more than five years, and that the act was not out of malice or willful attempt to impede the review. However, Krupp has the responsibility of keeping the records during a pending litigation instituted by itself. *See Koyo Seiko Co. v. United States,* 16 CIT ____, 796 F. Supp. 517, 525 (1992) (stating Commerce's delay is no reason for Koyo to destroy records in an ongoing investigation). The court finds it particularly disturbing that Krupp destroyed the records while it was asking the court to grant a full administrative review as an alternative relief. In light of the cooperation-inducing function of the BIA rule, Krupp should not find itself in a better position as a result of its noncompliance than it would had it provided the ITA with complete, accurate, and timely data. To use the rate claimed by Krupp as BIA could in effect reward Krupp for its failure to cooperate with Commerce in the investigation. Moreover, "the best information rule is designed to prevent a respondent from controlling the results of an administrative review by providing partial information or by delaying or hindering the review." *Rhone Poulenc,* 13 CIT at 225, 710 F. Supp. at 347 (citation omitted). To use the rate demanded by Krupp might have the effect of "plac[ing] control of the investigation in the hands of uncooperative respondents who could force Commerce to use possibly unrepresentative information most beneficial to them." *Id.*

Normally, when selecting a BIA rate for an uncooperative firm in an administrative review, it is Commerce's policy "to use the higher of (a) the highest rate for a responding firm with shipments during the period

or (b) that firm's own last rate." *Roller Chain from Japan,* 56 Fed. Reg. 32,175, 32,176 (Dep't Comm. 1991) (final results). This case, however, presents a special situation. Krupp is the firm that had the highest rate during the review period. Since this is the first administrative review, Krupp's own preliminary and final LTFV rates are the only data Commerce has for its selection of the BIA. Following the principle that a respondent should not be allowed to control the results of the review by providing partial information or otherwise hindering the review, *see Rhone Poulenc,* 13 CIT at 225, 710 F. Supp. at 347, Commerce had no choice but to reject the final rate claimed by Krupp and use the petition-based preliminary rate as the BIA.

2. *Use of Petition Information as BIA in Administrative Review:*

Krupp asserts that Commerce's use of petition-based information as BIA in the administrative review is not in accordance with law. According to Krupp, the plain language of 19 U.S.C. § 1677e(b) and its legislative history demonstrate that Congress intended to restrict the use of petition information as BIA to LTFV investigations.

Section 1677e(b) provides, in pertinent part:

> If the administering authority is unable to verify the accuracy of the information submitted, it shall use the best information available to it as the basis for its action, *which may include in actions referred to in paragraph (1) [a final determination in an investigation] the information submitted in support of the petition.*

19 U.S.C. § 1677e(b) (emphasis added).

Commerce contends that the reference to the use of petition information as BIA in 19 U.S.C. § 1677e(b) is permissive rather than restrictive, and the BIA statute (including section 1677e(b) and (c)) does not contain any prohibition, explicit or otherwise, against using such information as a basis for the final results of an administrative review. *Final Results,* Pub. R. 844 (Comment 3).

In support of their respective interpretations of the statute, both sides cite the following passage in the Conference Report accompanying the Trade and Tariff Act of 1984:

> The express reference in the statute to the use of information submitted in support of the petition as the best information available for purposes of the final determinations in investigations should not be interpreted as precluding the administering authority from using the best information available for purposes of administrative reviews.

Conf. Rep. No. 1156, 98th Cong., 2d Sess. 177 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5220, 5294. This passage in the legislative history, however, does not provide a clear answer to the question of whether, by the permissive language of § 1677e(b), Congress intended to restrict the use of petition information as BIA to the LTFV investigations only.

"A reviewing court must accord substantial weight to an agency's interpretation of a statute it administers." *American Lamb Co. v. United States,* 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986) (citing *Zenith*

Radio Corp. v. United States, 437 U.S. 443, 450–51 (1978); *Udall v. Tallman,* 380 U.S. 1, 16 (1965)). When an agency interpretation does not contravene "clearly discernible legislative intent," the role of the court "is to determine whether the agency's interpretation is 'sufficiently reasonable.'" *Id.* (quoting *Federal Election Comm. v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981)). "The agency's interpretation need not be the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding." *Id.* (citing *Chevron, U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 843 n.11 (1984)). Since the court does not find Commerce's interpretation of § 1677e(b) contravenes any "clearly discernible legislative intent," under the standard of *American Lamb* and in light of Commerce's broad discretion in selecting the BIA, the court must hold Commerce's interpretation as reasonable.

3. *Petition not on the Record:*

Krupp contends that Commerce's use of petition-based information as BIA is not supported by substantial evidence because the petition itself is not included in the record of this administrative review. Krupp stated during the oral argument, however, since the petition rate is the same as the preliminary rate, it would be senseless to remand the case solely for the purpose of placing the petition on the record, and that it would be sufficient for the court to address the issue of whether the record supports Commerce's finding of the dumping margin at 27%.

For purposes of judicial review under 19 U.S.C. § 1516a, the record, "unless otherwise stipulated by the parties, shall consist of (i) a copy of all information presented to or obtained by [Commerce] * * * during the course of the administrative proceeding * * * and (ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register." 19 U.S.C. § 1516a(b)(2)(1988). The record of this review contains, *inter alia,* a copy of the preliminary determination from the LTFV investigation adopting the petition rates, Pub. R. 9, and a copy of the preliminary results of the administrative review which refer to both the petition and the preliminary LTFV determination as the basis of BIA ("As BIA for [Krupp], [Commerce] used the simple average of the rates provided in the petition which is 27 percent. This also was the rate assigned to Krupp for the preliminary determination." 56 Fed. Reg. at 56,977). Pub. R. 614, 615. The petition itself is not included in the record. However, since the petition was not the information presented to or obtained by Commerce during the administrative proceeding of this review, Commerce is not required by the statute to include the petition in the review record.

The question is whether a published LTFV preliminary determination in the record is sufficient to support Commerce's BIA decision in the review. A similar situation was present in *Tai Yang Metal Indus. Co. v. United States,* 13 CIT 345, 712 F. Supp. 973 (1989), where Commerce used the final LTFV margin as BIA for the first administrative review

without incorporating into the review record the information from the LTFV investigation. Tai Yang challenged this practice as unreasonable. Citing Commerce's broad authority to use BIA and its policy to utilize margins from the most recently determined duty rate as BIA without reexamining the accompanying record, the court held that "it was reasonable for Commerce to rely upon the published margin from the LTFV investigation as the best information available, without reassessing the record therefrom." *Id.* at 351, 712 F. Supp. at 978. Thus, under *Tai Yang,* a published LTFV determination is sufficient for the record to support Commerce's BIA decision in the administrative review.

Substantial evidence "is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). Accordingly, the court finds that the record of this review, which includes the published preliminary LTFV determination adopting the petition rates, the published preliminary results of the administrative review referring to the use of the preliminary LTFV margin as BIA for the review, and the final results of the review explaining Commerce's position on the issue, contains substantial evidence supporting Commerce's BIA decision.

4. *Departure from Commerce Practice:*

Krupp also contends that Commerce's use of a petition-based preliminary LTFV margin as BIA in an administrative review is an unprecedented departure from its practice. Whereas Commerce has used petition information as BIA for administrative reviews in the past, in each of such occasions the petition information so used was also adopted by the final LTFV determination.

It is "a general rule that an agency must either conform itself to its prior decisions or explain the reasons for its departure." *Citrosuco Paulista, S.A. v. United States,* 12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1988) (citations omitted). While an agency is not obligated to follow prior decisions if new arguments or facts are presented that support a different conclusion, it cannot act arbitrarily. *Id.* (citations omitted).

In the Final Results, Commerce indicates the following reasons for its use of the petition-based preliminary margin as BIA. First, Commerce states that its selection of BIA is made on a case-by-case basis. Because each investigation and administrative review present it with a unique set of facts and circumstances, Commerce "often must select an appropriate unique BIA rate to achieve the purpose of the statute." *Final Results,* Pub. R. 848 (Comment 4). Second, Commerce indicates that it takes into account the level of cooperation by the respondent in deciding whether or not to use petition-based information in a given case. *Id.* "Because Krupp failed to respond to our most recent questionnaire and destroyed its business documents, thus precluding conduct of an administrative review and verification of the written information already on the record, * * * use of a less adverse rate as BIA in the instant review

would be inappropriate." *Id.* Pub. R. 856 (Comment 6). Because Commerce has provided these explanations, under the circumstances of limited BIA data in this review, the court finds Commerce did not act arbitrarily in using the petition-based preliminary LTFV rate as BIA.

5. *Preliminary LTFV Margin as BIA in Administrative Review:*

Krupp further claims that Commerce's use of a preliminary LTFV margin as BIA in the-administrative review is not in accordance with law because the preliminary LTFV margin cannot be used to assess antidumping duties where it differs from the final LTFV margin. According to Krupp, once Commerce calculated the final LTFV margin based on verified information, that margin supersedes all unverified information submitted in the petition as probative evidence of past and current conditions. Krupp points out that Commerce declared in its final LTFV determination that the rates established in the preliminary determination were "no longer in effect." 48 Fed. Reg. at 20,461.

Commerce counters that a preliminary LTFV margin has significant legal force and effect: it serves not only as the base for cash deposit or posting of bond for the period covered by this administrative review, but also the rate cap for merchandise entered between the dates of the preliminary and final LTFV determinations. *See* 19 U.S.C. § 1673f(a) (1988). Moreover, Commerce argues, since the preliminary and final LTFV margins both relate to the period of investigation, which is prior to the period of review, the final LTFV margin is no more probative of the dumping margin for the period of review than the preliminary margin. Having destroyed the records, Commerce contends, Krupp has not provided any evidence showing that the final margin is more probative than the preliminary margin for the period of review.

In support of their respective positions, the parties dispute whether the preliminary LTFV margin is a "prior margin" under *Rhone Poulenc,* 899 F.2d at 1190, which held Commerce may use the "highest prior margin" as BIA in an administrative review. The *Rhone Poulenc* court stated that "it reflects a common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced *current* information showing the margin to be less. The agency's approach fairly places the burden of production on the importer, which has in its possession the information capable of rebutting the agency's inference." *Id.* at 1190–11 (emphasis in original). Krupp argues that the preliminary LTFV margin is not a "prior margin" under *Rhone Poulenc,* because it has been superseded by the final margin as the most probative evidence of current margins. Commerce argues, on the other hand, that because a preliminary margin has its legal force, it "serves as a 'prior margin' to the same extent as a final margin." *Final Results,* Pub. R. 851 (Comment 5).

The court does not need to decide whether the "prior margins" under *Rhone Poulenc* include a preliminary margin. Krupp has provided no authority prohibiting Commerce from using a preliminary margin as

BIA when there is a superseding final margin. Given the special circumstances of this case, that is, Krupp's destruction of the records during the process of litigation and the limited BIA data for use, Commerce's choice of BIA is within its discretion and is in accordance with law.

CONCLUSIONS

For reasons stated above, Commerce's use of the petition-based preliminary LTFV margin as the best information available in the administrative review is supported by substantial evidence on the record and is in accordance with law.

NOTE: This is to advise that Slip Op. 93–85 is not available for publication at this time due to the confidential nature of the document. A public version of the document will be released and published in the CUSTOMS BULLETIN when available.

(Slip Op. 93–85)

NORTH STAR STEEL OHIO, A DIVISION OF NORTH STAR STEEL, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND SIDERICA, S.A.I.C., DEFENDANT-INTERVENOR

Court No. 92–01–00025

(Dated May 28, 1993)

(Slip Op. 93–86)

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW AND UAW LOCAL 595, PLAINTIFFS *v.* SECRETARY OF LABOR, DEFENDANT

Court No. 90–05–00263

[Judgment for defendant. Action dismissed.]

(Decided May 28, 1993)

Leonard R. Page, Associate General Counsel, International Union, UAW, *(Richard W. McHugh),* Associate General Counsel, International Union, UAW, for plaintiffs.

Stuart E. Schiffer, Acting Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Patricia L. Petty), Gary Bernstecker,* United States Department of Labor, of counsel, for defendant.

MEMORANDUM OPINION

DICARLO, *Chief Judge:* Plaintiffs, representing former employees of a General Motors assembly plant, challenge the Department of Labor's

determination denying certification for trade adjustment assistance under 19 U.S.C. § 2272 (1988). *General Motors Corp., Boc Linden, Linden, New Jersey,* 57 Fed. Reg. 53,141 (Dep't Labor 1992) (third notice of negative determination on reconsideration). The case was first remanded in June 1991. *See International Union v. United States Secretary of Labor,* 15 CIT ____, Slip Op. 91–48 (June 7, 1991). Subsequently, unpublished orders dated December 18, 1991 and September 1, 1992 directed remand for the second and third reconsideration. The court finds that Labor provided a reasoned analysis with factual data in its third remand determination. Since Labor's negative determination is supported by substantial evidence, the court affirms the results.

BACKGROUND

Plaintiffs assembled "L-body" vehicles, which General Motors sells as Chevrolet Beretta and Corsica passenger automobiles. The Beretta is a two-door sedan which seats four adults, has a wheelbase of 103.4 inches, is available with a standard four-cylinder or an optional six-cylinder engine and had a 1989 base price of $11,000. The Corsica is a four-door sedan built on the same chassis, with the same wheelbase and engine options having a 1989 base price of $10,410. *See International Union,* 15 CIT at ____, Slip Op. 91–48 at 2.

To determine whether increased imports of like or directly competitive articles contributed to the workers' separations, Labor examined changes in market shares of competitive domestic and imported vehicles in comparison with the subject vehicles. Labor found in its original determination that Beretta and Corsica automobiles would be competitive with cars having the following characteristics:

> 1. Vehicles in the classification should generally be offered in both two-door and four-door form. There should be seating for at least four adults, even in the two-door versions. Sports cars and sports coupes of the 2+2 configuration compete most directly in other classes.
>
> 2. Base prices should generally fall into the $8,000 to $10,000 range. For the most part, sticker prices for well-equipped models range from $12,000 to $14,000, possibly as high as $15,000. These prices should be used for comparison only. Individual dealer policies, the existence of publicized or secret rebates, etc. make determinations of actual as-delivered prices impossible.
>
> 3. In exterior size, wheelbase should fall between 97 and 103 inches. Two-door versions are usually a little shorter than four-door versions of the same nameplate; this is not true of the L-bodies, which share the same chassis.
>
> 4. Standard engines should be four-cylinder types; optional engines should be no larger than small six-cylinder types.

R. 18.

In remanding the initial determination, the Court noted that plaintiffs conceded the above criteria were reasonable, and that the government agreed the record lacked a reasoned explanation why Labor included in its analysis vehicles which differed substantially from the

stated criteria. *International Union,* 15 CIT at ____, Slip Op. 91–48 at 4. Labor agreed to consider plaintiffs' list of vehicles which they believed should have been excluded or included in Labor's analysis, together with plaintiffs' reasons for exclusion or inclusion. *Id.*

Although Labor agreed to exclude some of the imported models from the analysis, it again reached a negative determination because Beretta and Corsica automobiles and competitive imported vehicles both lost market share while the competitive domestic vehicles gained market share. *General Motors Corp., Boc Linden, Linden, New Jersey,* 56 Fed. Reg. 50,593 (Dep't Labor 1991) (negative determination on reconsideration). The matter was remanded to Labor again at defendant's request. Although Labor made minor adjustments, it affirmed its denial of eligibility for adjustment assistance. *General Motors Corp., Boc Linden, Linden, New Jersey,* 57 Fed. Reg. 931 (Dep't Labor 1992) (second notice of negative determination on reconsideration). Both parties moved for the third remand, and the court ordered Labor to:

> 1. include in the record *factual data* relied upon in determining passenger accommodations and cargo capacity and explain how they are applied in analyzing imported and domestic vehicles,
> 2. explain why its latest market segments include domestic vehicles with published prices which are lower than the published prices of imported vehicles when it stated at page 89 of the First Supplemental Record that one must "adjust published prices of domestic vehicles significantly downward before comparing them to published prices of imports," and
> 3. explain on what basis it distinguishes the eleven imported vehicles which were too small and or too inexpensive to be like or directly competitive with the vehicles produced by plaintiffs from the five domestic vehicles which plaintiffs claim are too small and or inexpensive to be like or directly competitive with the vehicles produced by plaintiffs.

International Union, Court No. 90–05–0023, Order (Sept. 1, 1992).

Labor in its third remand determination provided more detailed explanation of the market segments, but denied the certification for trade adjustment assistance. 57 Fed. Reg. at 53,143. Plaintiffs move for a fourth remand. The issue presented here is whether Labor's negative determination provides a reasoned analysis and is supported by substantial evidence.

Discussion

Trade adjustment assistance is available to workers separated from employment when Labor determines, *inter alia,*

> that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

19 U.S.C. § 2272(a)(3) (1988). Labor denied plaintiffs' petition finding that they did not satisfy this requirement.

Labor's findings must be upheld if they are supported by substantial evidence in the record. 19 U.S.C. § 2395(b) (1988). "Substantial evidence 'is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" *Matsushita Elec. Indus. Co. v. United States,* 3 Fed. Cir. (T) 44, 51, 750 F.2d 927, 933 (1984) (quoting *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 619–620 (1966)). Labor's determination made on the basis of those findings must be in accordance with law and must not be arbitrary or capricious, and for this purpose the law a showing of reasoned analysis. *Former Employees of Bass Enters. Prod. Co. v. United States,* 12 CIT 470, 472, 688 F. Supp. 625, 627 (1988).

Plaintiffs object to Labor's inclusion of "boxy, entry-level, subcompact cars" in the market segments for competitive imported and domestic vehicles, claiming those models differ widely in size and price from Beretta and Corsica automobiles. Although plaintiffs continue to challenge the inclusion of certain imported vehicles, their objection focuses on the inclusion of five domestic models.

Plaintiffs allege that the five domestic models in Labor's market segment should be excluded because they are more similar to the eleven imported models that were excluded upon reconsideration than to the subject vehicles. Plaintiffs emphasize the differences in passenger accommodation. In particular, they point out that the differences between the subject vehicles and the five domestic models.is greater than the differences between the domestic models and the excluded imported models in terms of wheelbase, width, leg room, head room and shoulder room. Thus, plaintiffs argue that Labor's market segment based on passenger accommodation lacks objective support.

Labor included in the administrative record of the third remand determination the factual data it relied upon in determining passenger accommodations and cargo capacity. 3d Supp. R. at 5–6 (incorporating *Consumer Reports* 268–69 (1989)). Although Labor included the information on measurements in the record, it also stated "[t]he tape measure doesn't tell you everything about comfort." (quoting *Consumer Reports*). 57 Fed. Reg. at 53,141. It further explained:

> [T]he interior measurements can only be used in conjunction with direct inspection of the vehicles in question to draw conclusions about passenger accommodations. [Labor]'s auto analyst conducts just such an inspection every year, and uses the conclusions obtained from these inspections to help in making accurate judgments about which vehicles offer comparable passenger accommodations.

Id. Labor thus provided the factual data it relied on in response to the court's remand order.

Plaintiffs also contend that Labor failed to provide a reasoned explanation as to its price criterion. They object to the inclusion of the same five domestic models because their prices are lower than the subject ve-

hicles. Plaintiffs challenge Labor's following finding, claiming it is not supported by substantial evidence.

> During the calendar years covered in the analysis (1988 and 1989), it was standard practice for domestic makers to publish base prices for stripped (poorly equipped) vehicles; importers did not follow this practice. Therefore, a true comparison of comparably-equipped domestic and imported vehicles requires that domestic vehicles with lower base prices be included.

Id. at 53,142.

Labor cited two sources. One is a study titled "Quality Change Under Trade Restraints in Japanese Autos" by Robert C. Feenstra, which found evidence of substantial upgrading in imported cars from Japan after the Voluntary Restraint Agreement entered into effect in 1981. *See* 3d Supp. R. at 9–17. The other was the data on average prices paid for domestic and imported cars compiled by the U.S. Department of Commerce's Bureau of Economic Analysis (as reported by the Motor Vehicle Manufacturers Association), showing the average import as consistently exceeded the average domestic car prices since 1982. *Id.* at 7–8. While a different interpretation of these authorities may be possible, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Matsushita Elec. Indus. Co.*, 3 Fed. Cir. (T) at 51, 750 F.2d at 933.

The court finds it significant that Labor took both passenger accommodation and price factors into consideration. Labor explained "no one vehicle characteristic defines its market segment." 57 Fed. Reg. at 53,142. Table I in the third remand determination shows the five characteristics representing passenger accommodation and the prices of the challenged domestic models and the excluded imported models. Labor explained:

> The five domestic and eleven imported vehicles all have comparable front leg room. Rear leg room measurements are also not generally different among these cars. However, there are very clear differences in wheelbase, overall length, luggage capacity and price. The latter characteristics are more than important enough to distinguish the five domestic vehicles from the eleven imported ones in a market analysis.
>
> The wheelbase measurements of the eleven imported vehicles (except for the LeMans) are significantly smaller than the five domestics. The overall length measurements are also significantly smaller. Luggage capacities are also smaller among the imports. Although these measurements criteria, except for the overall length, do not apply as strongly to the imported Pontiac LeMans, the base prices [of] all of the imports are significantly smaller than those of the domestic vehicles.
>
> In the analysis of published list prices above, it shows that base prices of imports should be somewhat higher than base prices of equivalent domestic models. *These factors, all taken together,* are

> the reasons that the listed imports were excluded from the market analysis while the listed domestic models were included.

57 Fed. Reg. at 53,142 (emphasis added).

Labor concluded that the excluded imported models belong to different classes from the included domestic models. The court is not persuaded by plaintiff's argument that "boxy, entry-level, subcompact" domestic models should be excluded because they are more similar to the excluded imported models than to the subject vehicles. Plaintiffs do not claim that the differences between the included domestic models and the subject vehicles are more significant than the differences between the excluded imported models and the subject vehicles. Plaintiffs' argument would require Labor to exclude every model which is more similar to the excluded models than to the subject vehicles. Labor needs to draw a line somewhere. It would be impractical to require Labor to construct market segments so that all included models are more similar to the subject vehicles than to all excluded models. "The nature and extent of the investigation in each case are 'matters which properly rest within the sound discretion of the Secretary [of Labor].'" *Miller v. Donovan,* 9 CIT 473, 479, 620 F. Supp. 712, 718 (1985) (quoting *Woodrum v. Donovan,* 4 CIT 46, 51, 544 F. Supp. 202, 205 (1982)). In compliance with the court's third remand order, Labor provided factual data which it relied upon in determining passenger accommodations and cargo capacity and explained its application.

CONCLUSION

Labor's finding that increased imports of like or directly competitive vehicles did not contribute to plaintiffs' separation is supported by substantial evidence. The court affirms Labor's determination denying certification for trade adjustment assistance to plaintiffs.

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